United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1153

To be argued by
W. CULLEN MACDONALD

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1153

UNITED STATES OF AMERICA,
Appellee,

—v.—

JACKSON D. LEONARD,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Jackson Day Leonard appeals from a judgment of conviction entered on March 7, 1975, in the United States District Court for the Southern District of New York, after a seven day trial before the Honorable Richard Owen, United States District Judge, and a jury.

Indictment 74 Cr. 599, in three counts, was filed on June 13, 1974. Counts One and Two charged Leonard with having willfully falsified his personal income tax returns, form 1040, for 1967 and 1968 in violation of Section 7206(1) of Title 26, United States Code. Count Three charged that Leonard in violation of Section 1001 of Title 18, United States Code, submitted to the IRS during the

audit of his 1967 return a written contract which had been willfully falsified (A. 1a, 5a-6a).*

Trial commenced on January 13, 1975, on Counts One and Two only, and concluded on January 21, 1975 with jury verdicts of guilty as to both counts (A. 2a, 997). Prior to trial, Count Three had been dismissed on the Government's motion (A. 445a).

On March 7, 1975, Judge Owen sentenced Leonard on each of Counts One and Two to eighteen month concurrent terms of imprisonment (fifteen months of which was suspended), a consecutive committed fine of $5,000 and costs of prosecution (A. 4a, 1026).

The appellant is enlarged on bail pending appeal.

Statement of Facts

Introduction

On November 16, 1966, Leonard, who then resided at 870 U.N. Plaza, New York, N.Y., and operated his chemical engineering consulting business at 437 Fifth Avenue, New York, N.Y. (See GX 1 at E. 37 and 10), told Charles H. McAlwain, Jr., the Assistant Manager of the Fifth Avenue and 37th Street branch of First National City Bank (FNCB) about then current negotiations for a design

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* All references in the form "A. a" are to the first 545 pages of Volume I of appellant's appendix; "A." without any lower case "a" following the page number refers to pages 1 through 1029 of Volumes I and II of his appendix immediately following A. 545a where the page renumbering ceased; "b" refers to the indicated page of the addendum to this brief; "GX" and "DX" refer to, respectively, Government's and defendant's exhibits reproduced in the Exhibit Volume at the indicated "E." page thereof, and "App. Br." refers to the Appellant's Brief.

contract between his firm and the Union Carbide Corporation (UCC). That officer's memo to the FNCB credit file recited that Leonard:

> "... told me in strictest confidence that he is about to close a deal with the Union Carbide Company regarding the designing of the world's largest Amine plant which Union Carbide is going to build in the vicinity of New Orleans. Mr. Leonard told me that his fee will amount to $1,000,000" (GX 64 at E. 126).

On January 23, 1968, Leonard caused Leonard Process Company, Inc., a New York corporation of which he was the President, to file with the Manhattan District Office of the IRS an election to be treated as a small business corporation under subchapter S of the Internal Revenue Code "for the tax year beginning January 1, 1968" (DX AK at E. 617). That filing had been authorized on December 27, 1967 by a board resolution requiring "this Corporation to elect under Subchapter S of the Internal Revenue Code for the calendar year 1968" (DX AJ).

On June 15, 1968, Leonard filed his 1967 personal income tax return, form 1040, with the Manhattan District Office of the Internal Revenue Service (A. 74; GX 1 at E. 3). As recited therein, his principal source of income was from his engineering business which reported a net profit of $256,873.95 on gross receipts of $461,000 (GX 1 at E. 10; DX S at E. 556), of which the portion attributable to work done for UCC was $291,000 (GX 76 at E. 286, 288-289; GX 77 at E. 296 and GX 92 at E. 408-409). In addition, Leonard reported $1,097.94 in dividends, $10,400 in interest income and a $5,846.56 net gain from the sale of securities and his seat on the New York Mercantile Exchange (*Id.* at E. 4, 8-9 and 25-26). Against this, since it was a joint return, he offset $15,166.46 in losses arising from his wife's "business as a professional singer of popular

music and also as a producer of popular records" (*Id.* at E. 18 and 29). This produced an adjusted joint gross income of $259,051.97 (GX 1 at E. 3, line 9), charged in Count One to have been understated by $24,168.09 (A. 5a).

On August 18, 1969, he filed his 1968 personal income tax return, form 1040, with the IRS (A. 76-77; GX 2 at E. 35). As recited therein, his principal income was still from the engineering business which reported a net profit of $114,726 on gross receipts of $142,000 (GX 2 at E. 45), of which $37,000 came from UCC (GX 80 at E. 250, 338, 349 and 352). While interest and dividends (from corporations other than Leonard Process Company, Inc.) remained approximately the same as 1967, Leonard's reported net gains from the sale of securities increased six fold to $35,047 (*Id.* at E. 40 and 43). Against this he offset the net losses arising from his wife's music activities as Susan Winford Productions and Action Sound (*Id.* at E. 47), and two of their three electing small business corporations, Suron Productions, Inc. and Gold Dust Records, Inc. (*Id.* at E. 41), together with his own "partnership and outside real estate syndicate" losses (*Id.* at E. 41 and 52), all together aggregating $23,764. This produced an adjusted joint gross income of $134,276 (GX 2 at E. 35 line 9), charged in Count Two to have been understated by $58,684.42 (A. 5a).

Leonard Process Company, Inc. filed no tax returns "for the tax year beginning January 1, 1968" (DX AK at E. 617), or for that matter any other tax year which included any portion of 1968. It filed no tax returns during 1968, 1969 and 1970 (A. 78).

Thus, Leonard included only $328,000 of UCC receipts during 1967 and 1968 in any tax returns, despite the fact that he actually received UCC checks in those years totaling $1,461,341.61. As will be seen, although he did "wash" $911,341.61 of such checks over to a prime subcontractor,

the Treadwell Company, he failed to report in either his own returns or on the books of Leonard Process Company, Inc. his receipt back from the Treadwell Company of any one of the latter's eighteen checks to him totaling $82,-852.51—$24,168.09 in 1967 and $58,684.42 in 1968.

The Government's Case

A. Leonard's Receipt and Treatment of UCC Income Throughout 1967 and 1968

1. During the first half of tax year 1967, Leonard faithfully received and recorded income under his contract with UCC by deposits into his FNCB account.

On February 27, 1967, Leonard signed his name to the UCC contract in the stated capacity of "an individual doing business under the name and style of the Leonard Process Company" (A. 89, 95-97; GX 5 at E. 57 and E. 100). In substance he promised to design an amines plant in Taft, Louisiana, and thereafter, a smaller, second one in South Charleston, West Virginia, in exchange for several scheduled lump sum payments totaling $750,000 (GX ¶¶ 3(a)-3(d) at E. 60-62), as well as certain additional cost (GX 3 ¶¶ 3(f)-3(g) at E. 62-63) and cost-plus 10% payments (GX 3 ¶ 3(e) at E. 62). Because Leonard was not qualified and large enough to do detail work, the latter paragraph 3(e) of the contract contemplated that all such engineering detailed design was to be subcontracted to the Treadwell Company, with Leonard still remaining responsible for such work and for which he would earn and receive from UCC "a fee of ten percent (10%) of said amounts [paid to Treadwell] to cover Contractor's [Leonard's] costs of processing and handling subcontracts for the Work" (A. 123-124, 127; GX 3 ¶ 3(e) at E. 62). Assignment of the whole contract, or any possible attempt to do so, including

specifically "any monies due or to become due under this Agreement, without the prior written consent of the other party, shall be void" (GX 3 ¶ 45 at E. 98-99; A. 155).

After the contract was signed on February 27, 1967, and initial notification to proceed was given, UCC promptly made two lump sum payments of $50,000 and $130,000 to Leonard, and the latter just as promptly deposited them into his FNCB account entitled "Mr. J. D. Leonard % J. D. Leonard & Associates" (Compare GX 3 ¶ 3(a) at E. 60-61 with GX 7 at E. 113 and GX 76 at E. 286; also GX 3 ¶ 3(b) at E. 61 with GX 8 at E. 114 and GX 76 at E. 288; GX 90 at E. 391). On June 22, 1967, UCC made the first of the required ten (10) monthly $37,000 payments toward the total $370,000, and Leonard deposited that check within a few days (Compare GX 3 ¶ 3(c) at E. 161 with GX 9 at E. 128 and GX 76 at E. 289). UCC made each of these first three checks payable to the "Leonard Process Company", just as it would the next twenty-three without variation, including both those paid before Leonard's attempted assignment of such items to Leonard Process Company, Inc., as well as those subsequent to UCC's later "written consent" to that assignment (compare GX 7-9 with GX 11-20, 22-24, 26-28, 30-32, 34-35, 37, 39, 41 and 43).

2. During the second half of 1967 Leonard deposited in his FNCB account only two of the ten UCC checks received by him.

On July 12, 1967, Leonard received the first of the cost plus 10% payments for his supervision of the first month of Treadwell's engineering efforts in the form of UCC's check totaling $6,465.29 (GX 86 at E. 389). Instead of depositing it, he endorsed it over to Treadwell to pay the latter's $5,877.54 billing invoice to him (A. 382; DXN at E. 517). The difference was paid back to Leonard by Treadwell's $587.75 check to the "Leonard Process

Company" (GX 44 at E. 152). He did not deposit "this fee of ten per cent (10%)" (GX 3 ¶ 3(e) at E. 62) into his FNCB account or any other, but instead on or about July 17, 1967, he cashed it at his local FNCB branch (A. 388-394 and 410; GX 76 at E. 290; GX 44 at E. 152). Similarly, on August 7, 1967, Leonard did not deposit in his FNCB account Treadwell's $2,973.62 check to him (GX 45 at E. 153)—which represented ten per cent of Treadwell's $29,736.22 invoice (DX N at E. 518), which Leonard had earlier paid to Treadwell by endorsing over to it UCC's August 1, 1967 check to him for $32,709.84 (GX 11 at E. 129)—but instead presented it in exchange for cash and traveler's checks (A. 408). And, on September 16, 1967, the pattern continued when Leonard paid Treadwell's third engineering invoice (DX N at E. 519) with UCC's check (GX 12 at E. 130), and then cashed the Treadwell ten per cent check issued back to him (GX 40 at E. 154).

On the previous day, September 15, 1967, and again on September 19, 1967, Leonard did deposit in his FNCB account the second and third UCC $37,000 monthly payments (see GX 86 at E. 389). In the earlier of these two payments, UCC lumped payment for both the fixed and cost plus invoices then due into a single check which Leonard then endorsed over to Treadwell and received back from that firm its separate checks for the $37,000 lump sum and the fourth ten per cent override (GX 13 at E. 131 and GX 78 at E. 292; GX 42 at E. 130 less GX 46 and 47 at E. 154-155). Similarly, on October 5, 1967, UCC again lumped payment for both varieties of invoices then due into a single $83,227.12 check (GX 14 at E. 132) which Leonard endorsed over to Treadwell in exchange for its checks for the fifth ten percent override (GX 48 at E. 156) and the fourth $37,000 monthly lump sum payment (A. 379-381; GX 49 at E. 125). Contrary to the mid-September practice, on October 11, 1967, at his FNCB branch, Leonard presented only the former Treadwell

check (GX 48 at E. 156) in exchange for $4,202.47 cash and did not then deposit the $37,000 check. Indeed, both it as well as all of the remaining 1967 fifth, sixth and seventh UCC monthly $37,000 payments were not deposited until 1968 (GX 86 at E. 389; GX 15, 17 and 19 at E. 133, 135 and 137; GX 76 at E. 293-295). And, of course, none of the three cost plus ten percent Treadwell checks issued back to Leonard during the rest of 1967 were deposited either since each was cashed at his FNCB branch within a day or so (GX 50-52 at E. 157-159; GX 76 at E. 293-295).

Thus, for tax year 1967, Leonard's monthly FNCB statements disclosed only five deposits totaling $291,000. Of course, none of those deposits included any of the seven ten percent Treadwell checks which Leonard had cashed for $24,168.09 (GX 76 at E. 286, 288 and 292). And, as will be seen, it was this FNCB bank record which was given to Leonard's accountant as the basis for Leonard reporting only that amount as the UCC portion of his 1967 receipts (GX 77 at E. 296 and GX 92 at E. 409).

3. The pattern continued into 1968, with Leonard depositing those 1967 UCC payments which had not previously been converted to cash.

On January 12, 1968, Leonard cashed the eighth Treadwell check in the sum of $6,229.20 representing the ten percent portion of UCC's payment for Treadwell's November 1967 invoice (GX 53 at E. 160; GX 20 at E. 138; DX N at E. 527). On January 17, 1967, Leonard deposited in his FNCB account the Treadwell $37,000 check issued three months earlier for UCC's fourth such monthly payment (GX 78 at E. 301; A. 379-381; GX 49 at E. 125).

On February 1, 1968, Leonard wrote UCC that the Leonard Process Company Inc., had "purchased the assets and business" (GX 65 at E. 1973) of his proprietorship. No

reference was made to their contractual provision voiding any such attempted assignment (GX 3 ¶34 at E. 98-99). Having advised UCC simply to "mark your accounts to reflect the switch to the corporate form of operation" (GX 65 at E. 173), Leonard next proceeded to open a new account at his FNCB branch in the corporate name with the October UCC $37,000 check (GX 15 at E. 133). Next, at one week intervals, he deposited the November and December UCC $37,000 checks into this corporate account without waiting for UCC's response (GX 17 and GX 19 at E. 135 and 137). And, although the first checks were drawn against this corporate account on February 7, 1968, no other corporate books of account would be kept for at least seven months (GX 98 at E. 484; GX 87-88).*

On February 20, 1968, Leonard received the ninth Treadwell check in the sum of $8,769.36 representing, as the invoice he delivered to UCC recited, "Leonard's fee for supervision of the subcontractor" through December 1967 (GX 54 at E. 161; GX 22 at E. 139; GX 21 at E. 115; DX N at E. 528; GX 85 at E. 385). This check bears the stamped endorsement of Leonard's proprietorship (compare GX 54 with GX 23, 28, 56, 57 and 61) together with a "special collection" stamped endorsement of the Australia and New Zealand Bank Limited, New South Wales, Australia, indicating that possibly "it may have been paid overseas" to someone (A. 413 and 410-411; GX 54 at E. 161). In any event, such an amount was not credited to either of the FNCB acounts then controlled by Leonard (GX 78 at E. 301-302 and GX 79 at E. 312-313).

On February 21, 1968, Marion Bardes, a bookkeeper employed by Leonard's accountants, completed her work

* Those which were then set-up in September, 1968, were and remain incomplete in numerous respects, not the least of which is the failure to reflect the issuance on February 1, 1968 of the $2,400,000 Leonard Process Company, Inc. note, due 1977, to the order of Jackson D. Leonard (DX AJ; GX 87).

on the "J Leonard Associates Schedule C" (GX 98 at E. 485). The gross receipts computation schedule (GX 77 at E. 296-297) was prepared from the 1967 FNCB monthly statements which, of course, gave no indication that $24,168.09 in cash had been paid to Leonard in the seven exchange transactions with Treadwell and UCC under their contracts with him (A. 426; GX 76-77 at E. 283-300). Since Leonard provided no other information as to this income, Bardes' initial draft income schedule failed to include any of it—and included only the $291,000 of deposits shown on the FNCB monthly statements (GX 92 at E. 408). That same figure was carried unchanged through the next draft which (1) subtracted the exchange receipts from customer catalyst purchases, since the same fees had been expended as "material purchases" GX 92 at E. 441, item 6 and E. 409), and (2) added back in amounts paid, but withheld, in Japan by that Government under our "double taxation" avoidance treaty (GX 92 at E. 409; GX 1 at E. 28; see also GX 80 at E. 350 and 358); and then was carried still without change into each of the final "JD Leonard 1967-Receipts" schedule, the draft return Schedule C and the final filed return itself, (GX 77 at E. 296, fourth column captioned "UCC"; GX 92 at E. 406; GX 1 at E. 10).

On March 5, 1968, Leonard cashed the tenth Treadwell check in the sum of $6,643.57 representing the cost plus ten percent through January 24, 1968 (GX 55 at E. 162; GX 24 at E. 141; GX 85 at E. 385; DX N at E. 531). Approximately two weeks later, on March 20, 1968, but still prior to the granting of authority to do so, Leonard deposited UCC's eighth monthly $37,000 payment, using a restrictive corporate endorsement stamp only and not his nearly identical proprietory stamp (GX 23 at E. 140). The invoice for this payment which Leonord's corporation produced in 1975 for trial (under an order that it do so despite Leonard's invocation of his personal Fifth Amendment privilege (A. 172; also see A. 103 and 1a-2a, 253a-254a and 299a)), was not the same as that which UCC had made a computer record of upon receipt in 1968. UCC actually

received Leonard's invoice bearing number "1010568" prior to the payment date of February 20, 1968, while the invoice produced at trial bore the number "14-105-68" and a handwritten payment received notation "3/14/68" (compare GX 85 at E. 385 with GX 71 at E. 278). In fact, payment had been made three weeks earlier on the date payment had been due and, once again, Leonard had simply postponed depositing the check until a time consistent with the other February 1968 deposits of the 1967 checks (A. 172-177). Indeed, each of those three $37,000 deposits also had a false, backdated invoice for it, first disclosed under the trial order, and each also bore equally false handwritten notations about the receipt of such payments in February 1968 (A. 172-177; compare the 1968 invoice numbers on GX 68-70 at E. 274-276 with the different invoice numbers recorded and paid in 1967 by UCC on GX 93 at 452).

On March 22, 1968, UCC agreed to execute a "consent" to an assignment of its contract with Leonard if he would personally agree, in the same writing, "to continue to remain obligated under the terms and conditions of the aforesaid agreement, notwithstanding said assignment" (GX 65 at E. 171). Thereafter, Leonard signed this document in both his corporate and individual capacities (*Id.* at E. 172). While UCC further recited that this agreement was "effective as of February 1, 1968," in fact no "prior written consent", as required by the original contract, was ever executed and, accordingly, all UCC's payments prior to March 22, 1968, totaling $275,027.46—of which $216,385.33 was "washed" through to Treadwell—were not properly assigned from Leonard to his corporation (GX 3 ¶ 45 at E. 98; A. 98-101 and 154-155). Thus, even if this "consent" instrument is viewed as having validly effected an assignment from Leonard to his corporation, it is clear that the receipt of the ten percent payments before March 22, 1968, totaling $21,642.13, was simply prior to UCC's extending even that much "written consent."

On April 4, 1968, Leonard cashed Treadwell's check back to him in the sum of $6,519.62, representing the cost plus ten percent payment through February 24, 1968 (GX 56 at E. 163; GX 26 at E. 142; GX 85 at 386; DX N at E. 532). On April 9, 1968, contrary to his attorneys' draft letter, "Leonard Process Co. Inc." (*sic*) requested an extension of the deadline for filing "my 1967 Federal income tax return" (GX 92 at E. 411-414). On April 15, 1968, UCC paid $37,000 pursuant to an invoice (a legitimate carbon of which was actually produced by Leonard Process Company Inc. for the trial), which recited that it was "for the 9th such payment", and which was promptly deposited in the FNCB corporate account (GX 28 at E. 143; compare GX 27 at E. 117 with GX 72 at E. 279; GX 85 at E. 386; GX 79 at E. 315).

On April 26, 1968, Harris Egan, the manager of the Chase Manhattan Bank (CMB) branch at the United Nations Plaza, personally delivered to Leonard at his apartment door, for the second time that month, that bank's official check in the sum of $120,000. Two weeks earlier, on April 12, 1968, he had delivered two other such instruments in the sums of $20,000, and $25,000. All three checks were payable to Leonard on the remittance instructions of a numbered account of Banque Cantonale de Zurich, a Swiss Bank (A. 479-489 and 504-507; GX 81 at E. 360-365). Leonard used most of these funds immediately to pay down an FNCB personal loan of his. By endorsing the CMB checks without restriction and delivering them to the loan and note teller at his FNCB branch, Leonard completely avoided both his corporate and proprietory FNCB bank statements (A. 388 and 394-396; GX 82 at E. 372).

On May 7, 1968 and, again, on May 28, 1968, Leonard cashed the next two Treadwell checks representing the cost plus ten percent payments through April 25, 1968 (GX 57 and 58 at E. 164-165; GX 30 and 32 at E. 144-145; GX 29 and 31 at E. 118-119). On June 1, 1968, Leon-

ard Process Company, Inc. issued to UCC "the invoice for the tenth and final payment" of $37,000 under ¶3(c) of the contract, which UCC promptly paid (GX 34 at E. 146; GX 33 at E. 120; GX 3 ¶3(c) at E. 61). One June 21, 1968, Leonard Process Company, Inc. deposited this check into its FNCB account as the final UCC income item under the contract (GX 79 at E. 317). During the next five months, that company endorsed over to Treadwell each of UCC's additional checks totaling $205,041.97 in payment of the Treadwell invoices plus the ten percent fee (GX 35, 37, 39, 41 and 43 at E. 147-151; DX N at E. 535-544). And, in accordance with the previously established pattern, Leonard continued to receive and cash each of the five Treadwell checks, totaling $18,640.16, issued back for the ten percent difference, for a 1968 total of 10 percent fees received of $58,684.42 (GX 59-63 at E. 164-170). With one exception, every one of the Treadwell checks making up this sum and issued back to him throughout the life of the contract was made payable to Leonard in his proprietory trade name, Leonard Process Company, as to which a New York State" certificate of firm name [had been] on file "since 1955 (GX 90 at E. 394; GX 44-48, 50-56, and 58-63 at E. 152-156, 157-163 and 165-170, respectively; compare GX 57 at E. 164). No change or variation was effected at any point during 1967 and 1968; neither after Leonard's unilateral February 1, 1968 void attempt to assign, nor after his personal agreement expressed in the UCC "written consent" document of March 22, 1968 "to continue to remain obligated" (GX 65 at E. 171).

B. For Separate, Wholly Independent Reasons, The IRS Twice Selects Leonard's Returns For Examination And Audit

1. An informant's report of Leonard's diversions triggers the original assignment of a revenue agent to conduct an audit and examination.

On June 7, 1968, the Manhattan District Director of the IRS wrote to Leonard and his wife advising them that their joint 1966 personal tax return, form 1040, had been assigned to revenue agent J. Rothstein "for examination" (A. 404a and 409a-410a; GXH 1 at E. 627; see GX 92 at E. 415-423). This decision was triggered by information that an informant had provided to the IRS and which had reached the Audit Division as early as April 16, 1968 (A. 417a). As the Government represented to the District Court at the pretrial hearing:

> "The informer's report, in substance, led to the facts of this case. It said, in essence, that Mr. Leonard was diverting income by getting kickback checks from a subcontractor that he endorsed over to the sub and as a consequence of that informer's report, the case was assigned out to an audit group to see if there was any truth to the allegations" (A. 334a).*

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* In the face of the Government's assertion of an informer's privilege as the basis for not disclosing the informer's report memorandum, Document 00025, the defendant abandoned his request for its production (A. 400a-402a). The representation quoted in the text was based upon the statement in this report that "checks paid by clients are reendorsed to the taxpayer's subcontractors who are required to issue their override check to the taxpayer". Beyond this limited matter, the Government reasserts its objection to anything further being disclosed. Of course, the entire document is available to this Court if the defendant seeks review here of the propriety of the Government's assertion of privilege, even though he now twice admits in his brief that one reason for the audit in this case was "an

[Footnote continued on following page]

As a matter of normal procedure during 1968, many such "information items", after the original debriefing by the Intelligence Division, were sent to a screening committee in the Audit Division to decide whether or not to conduct an audit of the taxpayer (A. 414a-417a). Of course, numerous additional techniques were also being used at that time to select taxpayers for examination and inclusion in the IRS' "audit stream" (A. 369a). Where a taxpayer was selected and a subsequent audit by a revenue agent uncovered evidence of fraud, the revenue agent was instructed to stop the examination until his report of that evidence has been reviewed at a higher level within the Audit Division. If believed to be well founded, that evidence was thereafter referred to the Intelligence Division, which either rejected it out of hand or accepted it by assigning a special agent to work with the revenue agent (A. 365a). Finally, it is clear and uncontradicted that until such an acceptance occurred, the applicable internal IRS instructions concerning the advice to be furnished by the revenue agent-auditor, as distinguished from special agents, to the taxpayer who voluntarily cooperated during an audit did not, and does not, require the revenue agent to provide *Miranda* warnings. Indeed, even in those instances where an uncooperative taxpayer was involuntarily summoned by a revenue agent, the latter's instructions provided that "it is not mandatory that the person summoned be informed of his constitutional privilege against self-incrimination" (*Internal Revenue Manual* § 4022.4 in GXH 2 at E. 629). If in doubt, the revenue agent was reminded that "Regional Counsel should be contacted for advice" (*Ibid.*).

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allegation by an informant that Leonard was receiving commercial bribes in connection with the UCC contract" (App. Br. 26) and that "an undisclosed informant, who was seeking a reward, claimed that Leonard had been receiving commercial bribes, i.e., illegal kickbacks from Treadwell" (App. Br. 4).

On June 14, 1968, Leonard signed the original of his 1967 personal income tax return, form 1040, without any change in the income items and, most particularly, without any change to the $291,000 UCC portion of the $461,000 in gross receipts (GX 1 at E. 3 and 10; GX 92 at E. 406 and 409).

2. When identified as part of a special project, Leonard was then reassigned to a different revenue agent who conducted his audit.

On July 18, 1968, Leonard's 1966 return was again selected for examination and audit. The reassignment memorandum, from the IRS' Assistant Regional Commissioner (Audit) to the Manhattan District, Audit Division Chief, in material part, stated:

> "Information obtained from a confidential source indicates that the above-named taxpayer has an account or has engaged in transactions with the following foreign bank(s):
>
> Peoples Bank, Switzerland
> (Bank uses both addresses.)
>
> This return has been selected for examination and audit under the Foreign Bank Account Project (for identification purposes: FBA) which was initiated in order to (1) ascertain the extent to which foreign banks are being utilized as a means of avoiding compliance with the United States tax laws, and (2) to accumulate knowledge as to the methods being used to accomplish this" (DX E at E. 507).

As will be seen, this latter purpose ultimately included a rewritten auditor's instructional or training manual which described several new audit techniques developed out of knowledge accumulated from this program (A. 370a-371a). As was explained to the District Court in uncontradicted testimony by B. H. Morris, a former IRS Senior Regional

Analyst in the office of the Assistant Regional Commissioner of Audit, now retired, the overall purpose or goal of the program was to develop new and different audit techniques to uncover the use of Swiss banks.

> "Yes. We were looking for audit trails, what we would call audit trails, some indication in records, in bank statements, that would indicate the existence, possible existence of a Swiss bank account" (A. 360a).

Toward this end, Morris worked and consulted with representatives of the Intelligence Division including Mr. H. Boller, his Intelligence counterpart at the Regional Commissioner's level (A. 358a). As Judge Owen expressed it in dictating his decision into the record, "the foreign bank project was planned and to some degree implemented jointly between audit and the intelligence divisions" (A. 16).

The program included approximately 165 taxpayers. This group had been selected from a larger group of names of persons who had received certain envelopes, air mailed from Switzerland to New York, during any of sixty days in the period January 1, 1968 through April 30, 1968 (A. 405a-406a). On the evenings of each of those sixty days, a U.S. Postal Inspector and an IRS Special Agent photostated with high-speed copiers the faces of air mail envelopes without return addresses and only such envelopes (A. 375a-377a). The entire sorting and copying process took place in the main 32nd St. Post Office and consumed approximately one-half hour during the evening before the normal sorting time for such mail began the next day (A. 398a and 378a). Depending upon the number of bags of air mail to be processed (surface mail was always intentionally ignored and, inadvertently, on several of the sixty days, some air mail bags were as well (A. 395)) one or two machines were employed, each of which had a capacity of 3600 photostats per hour (A. 377a). Thereafter, postage meter numbers on these photostats were examined to see

if any matched those which were known to have been used by Swiss banks (A. 376a). This final group, which amounted to thousands of envelopes at the end of the sixty days, was converted into a data processing print-out containing the recipient's name, address, dates of envelopes, and the bank involved (A. 379a-380a). Next, the tax returns for these individuals were examined by Messrs. Boller and Morris to select a representative group or sampling of 150 from the larger population of several hundred names so obtained (A. 364a, 369a and 399a). Since Leonard's return had previously been selected for audit, it was simply added, together with an additional 10 to 15 similarly situated returns, to the original target groups of 100 and 50 in the Manhattan and Brooklyn Districts. As to those taxpayers not selected for inclusion in the program, nothing further was done. Moreover, even as to those included, upon completion of this selection process and an initial introductory meeting, neither Boller nor any other Intelligence Division personnel had any further contacts with the individual audits or the revenue agents conducting them, unless fraud referrals later developed in accordance with usual procedures (A. 369a). All of the files and auditors' workpapers were kept in the separate District offices where such audit materials are normally found (A. 413). Indeed, the only variation from the norm in this regard was that monthly status reports were required, but even these were not to be disclosed to the Intelligence Division and they too stayed in the audit files (A. 392a and 408a-409a). Of course, from time to time, Boller and Morris would confer with one another as to generalities, but not about specific taxpayers or the state of any particular audit (A. 367a-369a).

a. The first stage of the FBA audit was to use all usual audit techniques supplemented with additional tasks to develop audit trails to the Swiss bank account or transaction.

The original instructions to the auditors, who were assigned to this project, not from any "select fraud group in the Audit Division" (App. Br. 6), since it had been abolished, but on the basis of superior individual accounting skills and merit (A. 412a and 416-418a), included the use of usual audit techniques employed in any in depth examination (A. 359a). For example, a taxpayer is normally asked at or near the outset of the audit if he would "identify those banks into which he deposits his business or wage receipts" and no variation from this was suggested (A. 359a). Additionally, however, the auditor was told to examine some types of records that would ordinarily be by-passed because of relative immateriality, such as telephone and telex charges and bills, since such might disclose the audit trail to the Swiss bank which had not been disclosed in answer to the opening inquiry (A. 284). Morris discussed this aspect of the instructions with Boller and both agreed that the purpose of the program would be frustrated if the auditor disclosed the foreign account knowledge at the outset before the completion of "the regular examination, the main idea being that they would probably in most cases uncover some information indicating the existence of this particular bank account" (A. 360a).

> "Q. And thus if an auditor walked in on day one and said, 'I know you are using the XYZ Bank. Show me your records.' Even if he obtained those records it wouldn't necessarily be useful in devising new and different audit techniques? A. That's right.
>
> Q. And that was a primary motivation deferring a square question until such time as ordinary auditing techniques had been exhausted. A. Exactly" (A. 361a).

b. The second stage, if reached at all, was to obtain the foreign bank material not uncovered during the first stage, by directly asking for it, in order to learn if and how any audit trails were missed.

If the original audit failed to turn up the account, the program then contemplated that the taxpayer would be directly asked about it in an effort to learn about the method of operation of his bank and how it had left no audit trails or, at least, ones that had missed being detected (A. 361 and 380a-381a). Furthermore, in accordance with general IRS experience in other audit areas, those who orally maintained that they had no such accounts would be asked to confirm that fact in the form of an affidavit "because our experience has been that when somebody, has to write about it they sometimes think twice" (A. 362a). As Morris later explained his and Boller's reasons:

> "As we said before, it was primarily a technique because if a taxpayer, anybody, has to put something in writing, when a taxpayer has to sign a statement that he has no Swiss bank account or Panamanian bank account, he's apt to think twice rather than just saying, 'No, I don't have any account, never heard of such a thing,' and that was the purpose of the statement" (A. 370a).

Typical examples of such requests during ordinary audits include requests for affidavits describing the support or alimony character of payments in income tax audits, and during estate audits, affidavits dealing with the character of transfers prior to death (A. 353a). After each step, those who disclosed the account were to be asked to produce their bank's records "so that the existence of such potential audit evidence could be checked against the program" (A. 353a).

3. Generally, Leonard and his attorneys dealt with the auditor through an accountant who controlled all access to records.

On August 7, 1968, revenue agent Mortimer Laski received his original assignment to audit Leonard's 1966 return under the FBA project (DX G at E. 510). In accordance with normal, non-FBA procedures, he added the 1965 return, and, later when the ordinary post-filing processing of it was completed, the 1967 return as well (A. 289). The first or original contact which Laski had was with Leonard's attorney, Jacob P. Lefkowitz. However, by the time the audit actually got underway, Laski's contacts were limited to Leonard's accountant, Edward A. Leskowicz (A. 433a-434a and 83a-84a; DX G at E. 510). On October 14, 1968, after several crossed telephone calls and one cancelled appointment, Laski and Leskowicz agreed upon a date when the audit would actually begin (DX G at E. 510). Neither at the outset, nor at any point during the course of the audit, did Laski ever represent that it was only of a civil character and that no criminal use would be made of its results (A. 439a).

On October 21, 1968, Leonard paid down his personal loan at FNCB by delivering to the loan and discount teller at his branch two properly endorsed CMB official checks in the sums of $64,000 and $16,000. Each of these, as well as the next one so used, dated November 27, 1968, in the sum of $138,000, had been issued and delivered by Egan in the same fashion as those previously delivered in the spring (A. 479-489, 504-507, 388 and 398-399; GX 81 at E. 366-371; GX 82 at E. 372).

On November 4, 1968, the audit began at Leskowicz's office with Laski examining, *inter alia*, the monthly statements for Leonard's personal or proprietory FNCB account against Bardes' 1967 income schedule which had been made up from them (A. 197-200; GX 76-77 at E. 283-297). Next,

Laski asked for the 1965-1967 "contracts re: Fees" (DX F at E. 509). Among the several agreements with different firms supplied was a version of the UCC agreement where the cost plus 10% paragraph 3(e) had been deleted by a hand inked line having been drawn through the last phrase "plus a fee ten percent (10%) of said amounts to cover contractor's costs of processing and handling subcontracts for the Work" (A. 200-205; GX 66 at E. 181). Laski made a note in his work papers of this alteration and returned the contract to Leskowicz (*Ibid.*; GX 89 at E. 392). Later, when Laski asked for additional documentation underlying all of these agreements and the implementation or administration of each, none was produced for the UCC contract, and particularly none of the invoices—false or true—subsequently produced at trial pursuant to subpoena (A. 219-220 and 293-295; GX 21, 25, 27, 29, 31, 33, 36, 38, 40, 42, 68-73 and 75).

On February 11, 1969, Leonard, his accountant and Allan J. Parker, one of his attorneys from the firm of Shea, Gallop, Climenko & Gould, met to discuss a problem which had arisen as a result of Laski's audit work through this point, which involved Leonard's failure in previous tax years to include in his returns the value of Canadian securities he had received, as compensation for designing a plant there, because of restrictions on the transferability of those shares (A. 211 and 349-360; DX AP). Following this meeting, Parker prepared a memorandum, dated February 13, 1969, in regard to the transaction (A. 361). A copy of this "opinion of counsel" was ultimately delivered, together with several attached exhibits, by Leskowicz to Laski (A. 365).

By March 15, 1969, Leonard had filed no income tax return for Leonard Process Company, Inc., for the 1968 calendar tax year in accordance with the effective date of his previous election (A. 78 and 82-83; DX AX at E. 617).

On April 6, 1969, Leonard did sign and, thereafter, file and receive, an extension of the April 15, 1969 deadline for his own personal 1968 return (GX 80 at E. 330). Moreover, even assuming both corporate authorization and the requisite filing of the "prior approval" application with the Commissioner to change the corporate tax year of Leonard Process Company, Inc. to one ending January 31, 1969, the tax return still was not filed by April 15, 1969 (A. 78 and 82-83). Indeed, none of the various drafts found of such returns—neither the one reporting a loss only because the 1968 cashed Treadwell items were omitted from gross receipts, nor the second increasing that loss beyond the sum of the Treadwell items—was ever filed (GX 99 at E. 465-469; DX X and Y at E. 559-568).

On April 23, 1969, Leskowicz introduced Laski to Leonard at the latter's office for the first and only meeting those two men ever had (A. 206, 756, and 758-766; DX AP). It lasted for a short time and no one else attended, neither Jacob P. Lefkowitz, the lawyer Laski originally had spoken to at the outset of the audit, nor Allan J. Parker (A. 206). No summons had been issued in connection with it. Because the FBA project had, as of this time, advanced to the second stage for those audits which had not disclosed the use of the Swiss bank account, the auditors had been instructed by Morris to directly ask the taxpayers—and not their accountants or attorneys who may well have been given no knowledge of the existence of the Swiss account by the client—about the matter (A. 361a-352a and 370a). This subject was on Laski's agenda because he had found no such audit trails in the years of his audit, 1965 through 1967. The other principal topic to be covered was the 1967 UCC payments and, as a sub-topic of that, the alteration of the cost plus paragraph 3(e) in the copy of the UCC contract which Leskowicz had given to Laski. The agenda also included certain other expense payments to the Catalytic Construction Co. observed by Laski in his audit, which he felt had not been adequately documented, together

with the opinion of counsel on the Canadian stock issue, which also had arisen for the first time during the audit.

At no point in the meeting did Laski warn Leonard that his answers to any of these inquiries might be used against him, that he had a right not to answer any of the questions, or that he had a right to seek the aid of his attorneys in responding or not. Instead, in accordance with the normal IRS procedure in such audit interviews, he simply put the various inquiries without discriminating between the various sources of his information, *i.e.*, informant, FBA or audit, which gave rise to the several questions. Leonard answered that he had no foreign bank accounts except for some Australian bank, which was in connection with his business project there with La Porte (A. 348-349 and 207). As to the UCC agreement, Leonard denied his receipt of the last four $37,000 monthly payments in 1967 and also falsely claimed that UCC had agreed to alter the cost plus payment provision and had authorized its deletion (A. 207-208). As to the Canadian stock, Leonard explained the Canadian legal restrictions and, further, that the $28,000 Catalytic Construction expense payment had been in cash and that explained the absence of any check in support of it (A. 211, 359-361 and 365-366).

On April 30, 1969, the second and final phase of the U.S. Postal Service's aid in supplying photostats of the non-return addressed air mail into New York was completed. During this phase, exactly the same procedures were followed as in 1968, except that the photostating was done continuously throughout the 120 days, and not on the intermittent, 1968 basis (A. 407a).

On May 19, 1969, Allan J. Parker supplied Leonard with his opinion as to the necessity for Leonard to report the value of stock which he received during 1968 as his fee for designing La Porte's Australian amines plant. As the memorandum recited, Leonard had received the stock dur-

ing 1968 as payment for his design services and the stock was subject to a stated restriction on its transferability. The opinion discusses the applicability of various cases and rulings and, ultimately, cautioned that:

> "With respect to filing Taxpayer's 1968 Federal Income tax return, it is recommended that no amounts be included in income on an account of the receipt of this stock but that an explanatory note setting forth the conditions of the contract making this restricted stock should be attached to the return. Otherwise, there is a danger that the omission of such a large item might color the whole balance of the return despite the fact that there is a legitimate basis for making this omission" (GX 102 at E. 497).

On August 14, 1969, despite the stated "danger" and its having been underscored by Leskowicz's own oral warnings, Leonard ordered that none of the recommended disclosure be included in his 1968 return (A. 700). Accordingly, Leskowicz erased what he had included in the draft return (compare GX 80 at E. 336 with GX 2 at E. 51), and on August 15, 1969 he signed and filed Leonard's final return without the recommended disclosure, pursuant to Leonard's explicit oral authorization (A. 701-702). This return, of course, did not include any of the $58,684.42 which Leonard had received in 1968 as the cost plus payments under the UCC contract (App. Br. 61). In his own memorandum to the bookkeeper preparing the return, Leonard specified only $37,000 of UCC income for inclusion in the return and that is all that was included (GX 80 at E. 350).

On August 27, 1969, Leonard executed the following affidavit:

"STATE OF NEW YORK
COUNTY OF NEW YORK ss:

JACKSON D. LEONARD, being duly sworn, deposes and says:

1. I make the following statements in connection with the examination of my U.S. Income Tax Returns for the years 1965, 1966 and 1967.

2. I do not now have and I have not had any foreign bank accounts. I have not had any transactions or dealings of any nature with any foreign banks or other representatives except for the following:

(a) Nominal currency conversions for living expenses while I was traveling.

(b) In 1968 I made use of Australian banking facilities to secure a loan which is directly related to an engineering project which I have completed in Australia" (GX 74 at E. 281).

Contrary to the current suggestion that Leonard might have signed this affidavit without reading it (App. Br. 16), the evidence is uncontradicted that either Leonard himself or some person on his behalf (as, for example, one of his counsel) prepared the exclusions, setting forth the 1968 exceptions as qualifications of the general language which Laski had requested. When asked about the whole affidavit and if he had dictated all of its provisions, Laski answered that he had originally authored only "part of the provisions" (A. 348). He then described that portion by quoting it. The quoted material included all of the generalities up to the proviso "except for the following" where his contribution ceased and somebody else's began (*Ibid.*). In any event, trial counsel conceded to the jury that before Leonard signed it, he caused the insertion of the 1968 qualification (A. 892). With the submission of this affidavit, Laski

closed the Swiss bank aspects of his audit and proceeded to send out standard third party confirmation letters to the various 1965-1967 revenue sources as to which his audit work thereafter would be limited (A. 379a and 99a; DX H at E. 511).

On October 9, 1969, UCC responded with a tabulation of 1966 and 1967 payments to Leonard far in excess of what had been deposited and reported (GX 86 at E. 389). Thereafter, Laski requested that UCC supply him with copies of its checks so that the endorsements could be examined for depository information (GX 93 at E. 450 and 454-455). On June 6, 1970, after some earlier difficulties in obtaining legible copies had been resolved, UCC provided Laski with copies of its checks to Leonard during 1965-1967 (GX 93 at E. 45). On June 30, 1970, Laski authored the final FBA project report (DX J at E. 413-514), closing out this aspect of the audit since, by that point, he had decided that the UCC proof warranted the submission of the standard "Referral Report For Potential Fraud Cases" (Form 2797) to the Audit Division Chief. This report, jointly authored by Laski and his successor revenue agent Bernard M. Singer (A. 109a-110a), was submitted to the District Court by Leonard's counsel as part of the factual basis for various oral pre-trial motions and colloquy and is accordingly reproduced as an addendum to this brief (A. 316a). Aside from two entries identifying Leonard's audit as an "F.B.A. Project Case" (1b-2b), every single substantive allegation in that report directly relates to information developed from the original informant's report and other matters developed in the course of Laski's audit, and not to any unsubstantiated information about foreign banks (1b-3b). Thereafter, on August 19, 1970, the auditor's group supervisor and the Chief of the Audit Division each indicated their agreement that such information warranted the referral to the Intelligence Division (2b).

c. On September 1, 1970, an IRS Criminal Investigation Is Undertaken on Grounds Wholly Unrelated to the FBA Project.

On September 1, 1970, the Intelligence Division accepted the referral and assigned special agent Norman Levy to conduct the future investigation (1b; A. 510a-511a). Thereafter, on every occasion when Leonard was interviewed, each session began with a recital of his *Miranda* rights (e.g. A. 173a and 460a-461a; see also the interview reports for these interviews disclosed to the defendant under Rule 16(a) and also marked for identification as part of GX 3502 and 3503).

On July 19, 1971, Leonard proposed to Mr. Jack Brooke, a business acquaintance, that if the latter would leave his then current employer, Kerr-McGee Chemical Corp., Leonard would pay him "$100,000 a year . . ., $50,000 of which would be made in U.S. dollars and $50,000 to be deposited into a Swiss bank account" (A. 510-511). Mr. Brooke did not reject the proposal out of hand, but said that he would consider it (A. 511). Later on that evening, when asked about the details of obtaining such accounts Leonard, although at first "evasive about how to get one", did ultimately admit to having one (A. 511). "He gave no indication of the size of *his* bank account or how long he had it, but he always said he was worth millions" (DX AE at E. 586 and DX AG at E. 602, offered and admitted without limitation at A. 535, 542-543; emphasis supplied). Finally, Leonard explained that "Swiss bank accounts are numbered and not in a name" (A. 512).

On April 10, 1972, Mr. Brooke gave a deposition in 72 Civ. 936 (IBW), Leonard's civil action against Kerr-McGee in the United States District Court for the Southern District of New York, literally, on his death bed (A. 540). Within weeks, his widow reduced to writing her recollections of Leonard's proposal to them on that evening, just quoted, at the request of Kerr-McGee's attorneys.

On April 11, 1972, Leonard signed his own 1971 personal income tax return, form 1040, which for the first time ever had inquired of him:

> "Did you, at any time during the taxable year, have any interest in or signature or other authority over a bank, securities, or other financial account in a foreign country (except in a U.S. military banking facility operated by a U.S. financial institution)?" (GX 83 at E. 373).

Leonard's answer was an unqualified "No" (*Ibid.*).

On June 5, 1972, B. Morris retired from the IRS and what remained, after four and one half years, of the FBA project (A. 412a-413a). With regard to that project, all the names over and above the pilot group of 165 had been rejected at the outset. Moreover, of the audits of even this latter group, most resulted in an actual examination of the foreign bank records, either by discovery during the first stage or taxpayer disclosure during the second (A. 361a). Indeed, less than a handful of the remainder resulted in fraud referrals to the Intelligence Division and fewer still in criminal references to the Department of Justice (A. 372a-373a). As planned, Morris wrote a chapter, published as part of the audit instructional manual, outlining those techniques which were learned as a result of the project (A. 370a).

The Defendant's Case

Throughout the proceedings below, Leonard's central defense was always a claim that he lacked willfulness in understating his returns. While his counsel had initially advised Judge Owen that such would be "part of the defense", (A. 304a) shortly thereafter, in seeking further "similar act" discovery, it became the exclusive or "only issue":

> "Highly probative, your Honor, certainly of willfulness, which is the basis for the admission of these [similar prior, contemporaneous and subsequent] acts in evidence; indeed, if the subsequent acts are admissible in evidence and, indeed, I think in this case, your Honor, the only issue will be willfulness" (A. 312a).

This issue was sharpened further in both Leonard's opening and his cross-examination of the Government's witness during its case-in-chief (A. 32-33, 35, 47, 50-52, 55, 57-58, 62, 124-125, 127, 352-354, 357-358, 360, 400 and 413-4; DX S and U at E. 553-557). For example, in the opening he repeatedly stressed a supposed obligation to prove that Leonard "willfully, intentionally, and knowingly, wanting to do something wrong, signed a tax return which he believed to be false" (A. 32), or "not an honest mistake on what the facts are, not an honest mistake as to what the law is, but lies" (A. 33), and that the issue is, "Did he do something intentionally, know it was wrong, and did he go ahead and do it anyway?" (*Ibid.*). And in cross-examining Laski, defense counsel initially noted that in the endorsement over to Treadwell of the UCC checks the "effect on the adjusted gross income would be zero" (A. 352-4), and then he inquired about "a number of transactions that were sometimes referred to as wash transactions" which, in effect, were not "reflected on the books" (A. 357).

In his defense, Leonard first presented partial alibi defenses through the testimony of his secretary and certain of his travel records as to each of the different meetings with Laski and Brooke (A. 606-612; DX AA-AD at E. 569-585), and then, through his handwriting expert, the defense that he did not sign the 1968 return (A. 622-649 and 659-664). However, even though Leonard himself did not testify, his counsel still asserted in summation that the proof failed to show willfulness (A. 845-7, 850-1, 860, 864 and 870).

> "But, ladies and gentlemen, if his accountant made mistakes, if his accountant did not include income or he did not take deductions, or if he didn't include the entire wash transaction, like these checks for some $900,000, don't hold Mr. Leonard criminally liable for that. That's not a crime, ladies and gentlemen, if he makes a mistake" (A. 874-875).

And, in addition, his summation also tied these willfulness arguments into the Court's charge which granted all that was requested in this regard (A. 49a-50a, 832 and 977-978) as follows:

> "I think his Honor will instruct you that the mere understatement of income, if you find that in this case, is not a crime. What is a crime is if you find, after looking at all the evidence here, that Mr. Leonard willfully, intentionally, with a bad purpose, knowing exactly what he was doing, went out and violated the law and committed two felonies (A. 875).

Finally, just before deliberations, Leonard requested and received a supplemental charge that he "contends that any error that was in any tax return that you may find was not willful" (A. 992).

ARGUMENT

POINT I

At the outset of the audit, Leonard received a written warning that his return had been selected "for examination." He was entitled to nothing further by reason of the information underlying that initial decision or its reaffirmation a few weeks later as part of the FBA project. His statements as to various matters made to both Revenue Agent Laski and his own accountant in his own office, and his later written reaffirmation of one of those statements, were all wholly voluntary. No fraud or deceit was practiced upon him at any point.

Leonard argues that the District Court erred in declining to grant his motion* to suppress those of his

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* The following record references are supplied for this Court's convenience in analyzing Leonard's Point I. The motion was first orally made at A. 316-318 on the sole ground that Laski was a secret special agent. It was first restated at A. 340a to claim that the IRS news release required warnings "once a case has even the possibility of a criminal aspect" and, then just before adjournment it was claimed that Swiss law was violated (A. 343a). At the hearing on the motion, the Government's evidence was taken at A. 355a-418a and the defendant offered none of his own, but though counsel conceded, at A. 434a, that his attorney was first contacted at the outset of the audit, and, at A. 439a, that Laski had not represented that the audit results would only be used civilly and not criminally. Trial counsel, who was familiar with the FBA project from previous cases, then limited the outstanding subpoenas duces tecum (none of which were to Boller, a point apparently misunderstood by current counsel who was not trial counsel and who has not collected any served subpoenas as part of the record on this appeal) to his stated offer at A. 422a-443a and the Court reserved decision at A. 443a. The District Court dictated its decision into the record at A. 15-16, and treated counsel's letter (CX 1 at E. 1) as a Notice of Motion.

statements to Laski on April 17, 1969 which related to foreign banking activities, together with his August 27, 1969 affidavit on the same subject, because Laski had not previously administered to him the *Miranda* warnings in accordance with two IRS news releases promising such warnings at the outset of any IRS criminal tax fraud investigation. Both the legal and factual bases for this argument are incorrect.

As a factual matter, the District Court had before it uncontradicted evidence that the FBA project was essentially an audit project designed to refine general auditing techniques and principles and that consultations with Intelligence Division representatives were limited to the original decision to ignore all of the FBA taxpayers except the 165 member test groups, unless and until any of the audits of that group resulted in a fraud referral report.* Despite repeated and ingenious arguments that such, nevertheless, constituted "essentially a criminal investigation" (A. 428a) within the meaning of the IRS' press releases, and that such warning requirements were being circumvented by using revenue agents as "Trojan Horses" (A. 435a, 438a, 442a), the District Court explicitly declined to make such a finding (A. 15-16). Indeed, Judge Owen accepted the offer of Leonard's counsel to prove "that there was a direction from the top that there was to be a prosecution of those using illegal Swiss bank accounts" (A. 443a), but held that such a direction warranted only a further finding, over and above Morris' uncontradicted testimony, that "the foreign bank account project was

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* There is no inconsistency between these intermediate audit purposes and an IRS representation to the Postal authorities, in order to identify the pilot group via the mail cover, that it would "assist in obtaining information concerning the commission or attempted commission of a crime" (39 C.F.R. § 233.2(d)(ii)) by others ultimately detected through the latter use of the audit techniques developed by the FBA project.

planned and to some degree implemented jointly between audit and the intelligence divisions and . . . that such a joint participation emanated from high levels" (A. 15).

No matter what was discussed at the top in the beginning, it is clear that all of the information that the auditors collected stayed in their individual files and was not communicated to the Intelligence Division in any form except possibly as part of some generalities which Morris may have disclosed to Boller (A. 469a and 413a). Indeed the only out-of-the-ordinary audit document was the monthly FBA status report which Morris, but not Boller, reviewed for developments (A. 408a-409a). The stark fact is that "Boller had no contact with the revenue agents on specific cases. We were quite meticulous about that" (A. 369a). Laski never reported to Boller or any other Intelligence Division personnel, directly or indirectly, any of his findings until in July 1970, eleven months after the Swiss bank aspects were closed out by settling for Leonard's affidavit in lieu of the Swiss records, he authored the fraud referral report which was wholly devoted to the facts underlying the original informant's report about the UCC payments (1b-3b; A. 109a-110a and 316a). And, morever, the District Court explicitly found that as to that latter aspect of Laski's audit work, instigated or triggered as it was by the original informant's disclosures, he was still simply an auditor and not a disguised special agent. That portion of Judge Owen's opinion, which he dictated into the record but was overlooked throughout Leonard's brief, is clear and unambiguous:

> "Agent Laski was an auditor, and his role was less centrally related than it was in the case of U.S. [v. Robson, 477 F.2d 13 (9th Cir. 1973], which I find controlling as far as I am concerned" (A. 16).

As a legal matter, Judge Owen initially ruled that since *United States* v. *Squeri*, 398 F.2d 785 (2d Cir. 1968) had indicated that "it really doesn't make any difference

what the purpose of the inquiry was" because "the taxpayer is on notice by just the fact of the inquiry that there is a criminal risk, even if it is only a revenue agent" (A. 439a), and so long as the interviews are noncustodial, the taxpayer is simply not entitled "to have the [*Miranda*] warnings" (A. 440a). In so holding, the trial Court was merely following that case as well as numerous others in and out * of this Circuit, all of which uniformly refuse to apply *Miranda* v. *Arizona*, 384 U.S. 436 (1966) to noncustodial interviews by IRS agents and employees (*United States* v. *Driscoll*, 399 F.2d 135 (2d Cir. 1968); *United States* v. *Dawson*, 400 F.2d 194 (2d Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969); *United States* v. *Mackiewicz*, 401 F.2d 219 (2d Cir. 1968); *United States* v. *Marcus*, 401 F.2d 563 (2d Cir.), *cert. denied*, 393 U.S. 1023 (1969); *United States* v. *White*, 417 F.2d 89 (2d Cir. 1969), *cert. denied*, 397 U.S. 912 (1970); *United States* v. *Shlom*, 420 F.2d 263 (2d Cir.), *cert. denied*, 397 U.S. 1074 (1970); *United States* v. *Caiello*, 420 F.2d 471 (2d Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970)). As Judge Lumbard explained in *United States* v. *Caiello*, the Fifth Amendment prohibits "the Government from *compelling* a person to incriminate himself" (*id.* at p. 473; emphasis in original) and, therefore, the central issue is always whether the agent's "questioning was noncoercive" (*ibid.*). Judge Lumbard went on to explain the reasoning for that formulation:

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* Our research has disclosed that other Circuits, no matter what their respective special agent rules might be, have uniformly admitted IRS interviews by revenue agents and collection agents prior to the acceptance of any fraud referral report by the Intelligence Division (*United States* v. *McCorkle*, 511 F.2d 482 (7th Cir. 1975) (*en banc*); *United States* v. *Robson*, 477 F.2d 13 (9th Cir. 1973); *United States* v. *Michals*, 469 F.2d 215 (10th Cir. 1972)).

See also *United States* v. *Viviano*, 437 F.2d 295 (2d Cir. 1971) and the holding and not the dictum Leonard quotes (App. Br. 32) in *United States* v. *Harary*, 71-1 U.S. Tax. Cas. ¶ 9362 (S.D.N.Y. 1971).

> "We can see no good reason for requiring government agents to give Miranda warnings whenever they deal with a citizen regarding possible tax liabilities under circumstances where the citizen is not under restraint and is at liberty to cooperate or not as he may choose. Every citizen must know and will be deemed to know that he is under an obligation honestly and fully to furnish correct information regarding his income and to pay the taxes which accordingly would be owing to the government. Every citizen also knows that false returns and fraudulent evasion of taxes are criminal offenses in violation of federal laws. So far as the citizen is concerned his duties and obligation and his liabilities for taxes for violation of law are the same regardless of the duties of the particular agents who may be assigned to investigate his returns, tax liabilities, and possible violations of the criminal law. And, of course, where there is no restraint and the contacts of the taxpayer and the agents extend over some period of time, there is ample opportunity for the taxpayer to seek such advice and assistance from third persons as he may desire" (*Id.* at 475; footnote omitted).

Moreover, Leonard is simply incorrect in his assertion that "this Court has not yet considered the effect of two recent IRS news releases which set forth self-imposed obligations to advise taxpayers" (App. Br. 21). In *United States* v. *Caiello*, *supra*, the appellant called both IRS news releases to the attention of that panel, quoted from them at length, pointed out their having been considered by the Seventh Circuit in *United States* v. *Dickerson*, 413 F.2d 1111 (7th Cir. 1969) and the Eighth Circuit in *Cohen* v. *United States*, 405 F.2d 34 (8th Cir. 1968), and that their announcements "subsequent to this Court's decisions [in *Squeri*, *Driscoll*, *Dawson*, *Marcus* and *Mackiewicz*]" (*United States* v. *Caiello*, *supra*, Brief for Appellant, p. 9) warranted his request that "this Court . . . reconsider [those]

decisions" (*Id.* at p. 8). This argument based on *United States* v. *Dickerson*, *supra*, including its discussion at p. 1117, was explicitly considered and rejected.

> "We reject the reasoning of the majority opinion in *Dickerson* and affirm our long line of cases refusing to require such warnings. . . ." (*United States* v. *Caiello*, *supra*, at 472).

Judge Owen also considered and rejected Leonard's argument that these decisions are no longer persuasive since they all dealt with fast situations arising prior to the IRS news releases and two further Circuit Court decisions referring to the self-imposed standards there announced, *United States* v. *Heffner*, 420 F.2d 809 (4th Cir. 1970) and *United States* v. *Leahey*, 434 F.2d 7 (1st Cir. 1970). Judge Owen stated that even "assuming again that [he] would follow" (A. 16) the *Leahey* and *Heffner* decisions, he found that Laski was not required to give any "warnings under the press release" (A. 16). He then indicated, as an alternative reason for his decision, "strong doubts that in any event the Second Circuit would follow" (A. 16) either *Leahey* or *Heffner* because of "the reasons expressed in" *United States* v. *Fukushima*, 373 F. Supp. 212 (D. Hawaii 1974).

In that decision, Chief Judge Pence had carefully considered both *Heffner* and *Leahey*, and ultimately concluded that analysis undermined their stated rationale. With regard to *Heffner*, the earlier of the two, Judge Pence pointed out how it "well illustrates the axiom: hard cases make bad law" (*Id.* at 215). There the majority reversed the conviction of an "uneducated and emotionally disturbed man" (*Id.* at 810) who had falsified his IRS W-4 by "claiming a ridiculously large number of exemptions" in order to publicize to the Government some imagined grievance (*Ibid.*). The Special Agents interrogated him, in the ab-

sence of counsel or an accountant,* at the local IRS office where he twice "seriously incriminated himself" (*Id.* p. 811). Perhaps influenced by Judge Bryan's more critical dissent in *Heffner* that the majority had arrived at an "unsound" (*Id.* at 814) ground on its own, without the benefit of brief or oral argument, Chief Judge Pence simply concluded that the *Heffner* majority had gone "far out to uncover some sort of not-too-implausible authority upon which to peg their ultimate conclusion" which he accordingly rejected (*United States* v. *Fukushima, supra* at 215). In *Leahey*, a woman was interrogated by Special Agents at her home also in the absence of counsel or an accountant, and on the second such occasion, she delivered up incriminating information and records. As Chief Judge Pence then noted, the *Leahey* opinion was promptly followed (while being criticized) by Judge Wyzanski, in *United States* v. *Bembridge*, 335 F. Supp. 590 (D. Mass. 1971). However, upon the Government's appeal to the same panel that decided *Leahey* of Judge Wyzanski's order granting the motion to suppress that panel, worried that it might have "erred grievously", (*United States* v. *Bembridge*, 458 F.2d 1262, 1264 (1st Cir. 1972)), reversed the District Court's order to suppress by circumscribing the broad scope of *Leahey*, and thereby authorizing reasonable departures from the IRS' press release formulation. Moreover, *Leahey* has recently been further circumscribed by the same panel in *United States* v. *Morse*, 491 F.2d 149 (1st Cir. 1974), where it declined to adopt any "*per se* rule of exclusion" (*Id.* at 156) for an admitted violation of the press release.

And, in addition, it appears as if the Fourth Circuit still follows the rule which obtains generally in all Circuits that non-fraudulent deviations by agents of other federal agencies from their respective internal interviewing instruc-

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* A factor which even the First Circuit has suggested might well be determinative (*United States* v. *Mitchell*, 432 F.2d 354, 356 (1st Cir. 1970)).

tional manuals, whether or not any editions of such have ever been published or otherwise publicized, are of no moment. (E.g. *United States* v. *Bradley*, 447 F.2d 224 (2d Cir. 1971) (U.S. Postal Inspection); *United States* v. *Hall*, 493 F.2d 904 (5th Cir. 1974) (U.S. Secret Service); *United States* v. *Castellana*, 488 F.2d 65 (5th Cir. 1974) (F.B.I.); *United States* v. *Thompson*, 475 F.2d 1359 (5th Cir. 1973) (I.N.S. Border Patrol); *United States* v. *Sicilia*, 475 F.2d 308 (7th Cir.), *cert. denied*, 414 U.S. 865 (1973) (FBI); *United States* v. *Sosa*, 469 F.2d 271 (9th Cir.), *cert. denied*, 410 U.S. 945 (1972) (U.S. Customs); *United States* v. *Thomas*, 475 F.2d 115 (10th Cir. 1973) (U.S. Marshal)). In *United States* v. *Fish*, 432 F.2d 107 (4th Cir. 1970) a different Fourth Circuit panel refused to suppress an FBI agent's interview although obtained from the defendant without giving him the warnings that the Director of that Bureau had publicized as early as 1952. (See *Miranda* v. *Arizona*, 384 U.S. 436, 483 (1966)). Indeed, even as the *Heffner* majority was filing its opinion, yet another, different panel was deciding *United States* v. *Browney*, 412 F.2d 48 (4th Cir. 1970) and also explicitly rejecting *Dickerson*, including, of course, those of *Dickerson's* arguments * which had incorporated the IRS press releases because:

> "The law in this circuit is clear that one is not entitled to notice of a right to counsel prior to an interview during which he is neither in custody nor 'deprived of his freedom of action in any significant way' and where there is no evidence of coercion or intimidation on the part of the tax agents conducting the interview. United States v. Bagdasian, 398 F.2d 971 (4 Cir. 1968); United States v. Webb, 398 F.2d 553 (4 Cir. 1968); United States v. Mancuso, 378 F.2d 612 (4 Cir. 1967)." (*United States* v. *Browney*, *supra* at 51).

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* The U.S. Supreme Court has granted *certiorari* in *United States* v. *Beckwith*, 510 F.2d 741 (D.C. Cir. 1975), *cert. granted*, 43 U.S.L.W. — (June 16, 1975) which also had explicitly rejected *Dickerson's* reasons.

Judge Owen was clearly correct in distinguishing *Leahey* and *Heffner*, both of which involved Special Agents conducting criminal investigations face-to-face with the taxpayer alone, who was not then or yet attended by any professional advisers. Moreover, he was clearly correct as a factual matter in concluding that Laski was not conducting any criminal investigation within the meaning of the IRS' own procedures, and thus that Laski was held only to the standards of reasonableness as set forth in his own auditor's manual (GX H 2 at E. 628).

POINT II

Costello's approval of limited mail watches was properly decided in the first instance, has since been widely approved, and should not now be overruled. The uncontradicted proof here established that its mandate was obeyed. Having elicited further uncontradicted proof that the mail watch on his Swiss mail had been properly authorized by the U.S. Postal Authorities, Leonard below abandoned any contrary claim.

Leonard argues that the District Court erred in denying his motions "to dismiss the indictment or to suppress evidence" on the ground of "an illegal mail watch" (App. B. 33) because the IRS and the U.S. Postal Service violated their own regulations, the criminal prohibitions against obstructing the mails (18 U.S.C. § 1702) and Leonard's First and Fourth Amendment right, (App. Br. 37) in permitting photocopying of the fronts of six envelopes addressed and mailed to him in early 1968 by the People's Bank of Zurich. Several of these arguments were either never raised or explicitly abandoned below. Moreover, in addition to an affirmance on that ground, *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966), all of these various arguments are also erroneous and should be rejected on the merits.

A. Introduction—The Motion, the Hearing and the Rulings below.

Leonard's trial counsel first orally moved, at A. 318a-323a, for a hearing as to this matter on the sole ground that *United States* v. *Costello*, 255 F.2d 876 (2d Cir. 1958) was not controlling because Leonard was "prepared to submit an affidavit that his mail, especially from foreign sources, during the period in question was erratic and delayed" (A. 318a). Everything, according to the view then expressed, depended on the establishment of such a delay since only "*if* it can be shown at the hearing that the mail, in fact was delayed" (A. 321a) would there then be, so the argument continued, violations of the First and Fourth Amendments, three sections of the U.S. Criminal Code (18 U.S.C. § 1701-3), unspecified Swiss law, and maybe a "possible violation of the Post Office Regulations" (A. 322a). Next, the motion was expanded somewhat more, at A. 340a-346a, with the claim that Swiss law was violated, even if the mail had not been delayed, by the IRS "attempting to get Swiss banks to disclose what American citizens have Swiss bank accounts" (A. 343a).

At the hearing on the motion, the Government presented the evidence of B. Morris, who testified that no delay whatsoever resulted from the short high speed photostating process since the mail was not to be sorted until the following morning anyway, and moreover, that none of the mail was ever opened (A. 373a-376a). He specified when his knowledge was direct and when it was based on the reports of subordinates. On cross-examination, he was squarely asked —without limitation—about the authorization process:

> "Q. Can you tell us how this whole mail watch was authorized? Who authorized it to begin with? Do you know, Mr. Morris? A. It was approved by the National Office of Internal Revenue, with the Postmaster General, and the actual immediate setting up of it was a letter from the Commissioner in

> the North Atlantic Region addressed to the Chief Postal Inspector in New York, and he had the approval of Washington to go ahead with it" (A. 387a-388a).

Thereafter, Leonard's counsel referred to having subpoenaed several IRS officials, but not any U.S. Postal personnel or files. At this point, Judge Owen asked: "Is it your contention that this mail watch that included Mr. Leonard's mail was not authorized?" (A. 389a). Instead of explicitly answering and admitting that he made no such contention, Leonard's counsel temporized by referring to the argument that Laski's capacity was that of a secret special agent (A. 389a-390a). Accordingly, Judge Owen repeated his question for the second time:

> "The Court: You are getting at the capacity of the people rather than the authority to make the watch. I had the feeling that you were getting into—" (A. 390a).

Again, in his answer this time, counsel merely asserted that his claim was limited to Laski's capacity and whatever light * the mail watch gave to it.

> "Whether it was conducted properly and, as a result of that, were Mr. Laski and his colleagues in fact acting under the direction of a special agent—Now, he might have been under the direct line of control of Mr. Morris, but Mr. Boler certainly had a hand in it. I hope to develop what was done and what was not done" (A. 390a).

Instead of repeating his question for the third time, the District Court simply permitted the cross-examination to proceed. Nothing further was elicited as to the District Court's question, and nothing was presented by Leonard to contradict the testimony previously quoted. Leonard pre-

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* Compare *United States* v. *Jaskiewicz*, 433 F.2d 415, 420-421 (3d Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971).

sented no evidence whatsoever in support of his motion and, when squarely asked by the District Court, acknowledged that "the whole story is in with respect to the whole mail watch" (A. 419a).

At this point, Judge Owen asked again, "because we are holding a hearing on what I would regard as the most informal of bases", for a statement of the basis for the motion for "exclusion of the material picked up in the mail watch" (A. 419a). Counsel admitted that the record had established that the IRS had received "approval from the Post Office", while quickly adding that since he had not researched it he did not know "if it complies with their regulations" (A. 420a). Following his next ground which was a barren argument that 18 U.S.C. § 1702 was probably violated, Judge Owen asked, "is that factually the high water mark? You just say they didn't have a right to do it?" (A. 420a) despite:

> "The cases that are cited in the [United States v.] Isaacs [, 347 F. Supp. 743 (N.D. Ill. 1972)] case, where Courts of Appeal of all kinds say there was no substantial delay involved in the delivery of the mail—here apparently there was zero delay in the delivery of the mail." (A. 421a).

The only distinction then proffered, and here repeated, was that the several prior decisions only involved "a simple mail cover" (A. 421a) and had not dealt with broadscale attacks on any of the classes of mail subject to such surveillance. Twice more, Judge Owen asked if Leonard was going "to offer any proof on this mail cover issue" (A. 422a) or whether he intended "to make any showing that there has been a delay in delivery of this man's mail?" (A. 423a). Finally, counsel responded that the affidavit Leonard had promised about delay "during the period in question" (A. 318a) was not going to be forthcoming since, "I don't think I could tie it precisely to those periods, your Honor" (A. 423a). At this point, the District Court dictated its factual findings as to delay:

> ". . . on the testimony of Mr. Morris it would appear that there was absolutely no interference with the flow of the mail at all, because, according to his testimony, that mail wasn't going to be sorted anyway. So it was sitting there that night, and either it sat in the bag or it went through the microfilming process" (A. 423a).

Counsel next repeated his further claim to the aforementioned violation of 18 U.S.C. § 1702 (A. 426a). After the District Court had indicated that *Costello* had discussed such a claim as well, counsel agreed that all outstanding subpoenas duces tecum called for "documents [which] would not be relevant" (A. 426a) on the mail cover since they had been directed to the IRS "on the secret agent issue" (A. 425a). Whereupon, the Court denied "[Leonard's] motion to suppress the fruits of the mail cover" (A. 426a).

B. The District Court was clearly correct in finding no violation of Leonard's rights under the Constitution and the statutes.

Leonard's claimed violations of his constitutional rights are wholly unsupported by any authorities, for the simple reason that all reject his claims. While a reasonable expectation of privacy, fully protected by the Fourth Amendment from unreasonable searches and seizures, clearly exists in the contents of sealed mail, it has been recognized for nearly a century that an important distinction or "except[ion exists] as to their outward form" (*Ex parte Jackson*, 96 U.S. 727, 733 (1877)). As this Court stated in *Costello*, this portion of the Supreme Court's discussion in *Jackson* indicates that a Constitutional distinction:

> ". . . is to be drawn between material which is sealed and material which is open for inspection. We think

> the Jackson case necessarily implies that *without offense to Constitution* or statute writing appearing on the outside of envelopes may be read and used" (*Id.* at 881; emphasis supplied).

This same portion of *Jackson* has since been quoted with approval in *United States* v. *Van Leeuwen*, 397 U.S. 249, 251 (1970) where the Court found a one day delay of suspected packages of mail to be reasonable under the Fourth Amendment. Moreover, this portion of *Costello's* holding has been adopted and followed in *Cohen* v. *United States*, 378 F.2d 751, 759-760 (9th Cir. 1967) (*held* that mail watch did not violate the Constitution including "the exercise of First Amendment rights"), *Lustigar* v. *United States*, 386 F.2d 132, 138-139 (9th Cir. 1968), *cert. denied*, 390 U.S. 951 (1968) (*held* that "the Fourth Amendment does not preclude postal inspectors from copying information contained on the outside of sealed envelopes in the mail, where no substantial delay in the delivery of the mail is involved") and *Canaday* v. *United States*, 354 F.2d 849, 856 (8th Cir. 1966).

Moreover, Leonard's distinction on the basis that the earlier cases dealt with "specific individuals who were reasonably suspected of having committed" (App. Br. 35) crimes while here a "broadscale mail watch of entire classes of people without any showing that probable cause exists" (App. Br. 37) is largely erroneous. In the first place, nothing in those cases indicated any such standard or evidentiary minimum and, indeed, the *Jackson* focus on "what is intended to be kept free from inspection" (*Ibid.*) properly emphasizes the unreasonableness of any expected privacy with respect to the outside of envelopes. Furthermore, the distinction would be more serious if it involved classes of domestic mail, but here each and every envelope could have been opened without any warrant under applicable and longstanding border search principles. As the Court recently held in *United States* v. *Odland*, 502 F.2d

148 (7th Cir.), *cert. denied*, 419 U.S. 1088 (1974), the Government:

> ". . . is free to spot-check incoming international mail at the port of entry, or to inspect all such mail, or to inspect any such mail which attracts the inspector's attention.
>
> * * * * *
>
> We note that other courts which have considered searches of incoming international mail have reached similar results, although the Government advises that no previous case involved opening a first class letter. United States v. Doe, 472 F.2d 982 (2d Cir. 1973); United States v. Galvez, 465 F.2d 681 (10th Cir. 1972); United States v. Beckley, 335 F.2d 86 (6th Cir. 1964); State v. Gallant, 308 A.2d 274 (Me., 1973); United States v. Feldman, 366 F. Supp. 356 (D. Haw. 1973) (collecting cases)." (*Id.* at 151).

And whether or not the right to inspect is or is not exercised by the Customs inspector, both the sender and recipient must be held to contemplate such a possibility in assessing whether any particular class of letters "enjoyed a sufficient expectation of privacy" (*United States* v. *Francis*, 487 F.2d 968, 972 (5th Cir. 1973), *cert. denied*, 416 U.S. 908 (1974) (Godbold concurring); See also *United States* v. *Swede*, 326 F. Supp. 533 (S.D.N.Y. 1971) (*held* warrantless opening of first class envelope from Zurich, Switzerland did not violate Constitution)).

With regard to Leonard's claim that the mail cover violated the applicable U.S. Postal regulations, it need only be noted that no such argument was presented to or considered by the District Court. It is of no moment that the regulations now claimed to have been violated were "not known" (App. Br. 33) to Leonard's counsel when he elicited Morris' description of the authorization request "letter from the Commissioner in the North Atlantic Region

addressed to the Chief Postal Inspector in New York" (A. 387a). His decision not to obtain and offer this letter "on that [mail watch] issue" (A. 426a) simply cannot be elevated into either non-compliance with the regulation or any Governmental failure to prove what was not in issue. In any event, Morris' testimony satisfies the regulation's requirement of a "written request" (39 CFR § 233.2(e)(ii) (1975); 39 CFR § 233.2(d)(ii) (1975)). Even if it did not, Leonard fails to refer this Court to any authority suppressing mail cover evidence obtained in violation of the Postal regulations for the good reason that here too such authority as there is points the other way (*United States* v. *Schwartz*, 176 F. Supp. 613 (E.D. Pa. 1959), *affirmed on other grounds*, 283 F.2d 107 (3d Cir. 1960)).

POINT III

As to the falsity of Leonard's 1967 and 1968 tax returns, Leonard's counsel placed "willfulness" sharply in issue. Leonard's false statements in his 1971 tax return and in his 1969 affidavit were acts similar to the misconduct charged in the indictment, and evidence of those similar acts was properly admitted on that issue of "willfulness". The District Court properly exercised its discretion.

Leonard, relying on *United States* v. *Deaton*, 381 F.2d 114 (2d Cir. 1967), makes the familiar argument that the District Court erred in admitting into evidence his 1971 tax return and his 1969 affidavit, together with the evidence establishing the falsity of both, because of an alleged "prejudicial and inflammatory effect" outweighing probative value. He further argues that the District Court abdicated its responsibilities in this respect and instead "merely deferred to the prosecutor's judgment" (App. Br. 40). The latter argument is flatly incorrect since Judge Owen did not, in fact, do any such thing. Moreover, on the merits, his exercise of discretion was plainly correct.

A. Pretrial—Leonard's "willfulness" defense of bribery.

In seeking five additional peremptory challenges, Leonard's counsel advised the Court that "part of the defense" will be that the diverted moneys were not reported because they were received into Leonard's business and promptly paid out in order to bribe labor leaders (A. 304a). In his proposed requests to charge, he further specified this aspect of his claimed lack of willfulness, since such a penny-for-penny payout or "wash" would arguably make his return "accurate as to the adjusted gross income" (A. 49a-50a; see also Request No. 26 at 62a-63a). Moreover, in an effort to obtain broad discovery, he also once represented, that "the only issue will be willfulness" (A. 312).

B. The Openings.

After the selection of the jury and immediately prior to the opening statements, Judge Owen called counsel into the robing room to discuss several issues including one aspect of Leonard's earlier request "to instruct the Assistant United States Attorney not to mention that [August 27, 1969] affidavit [GX 74 at E. 281] in his opening statement and not to mention those [CMB] checks [GX 81 at E. 360-372] in his opening statement" (A. 12). At that point, the District Court pointed out the obvious that:

> ". . . false exculpatory statements [are] admissible in any kind of a case, and if the Government fails in demonstrating [that] the statement is false and exculpatory then they have fallen on their face and that's the end of it" (A. 12).

The Government had previously submitted two memoranda in support of the admissibility of the August 27, 1969 affidavit, the CMB checks and Leonard's 1971 and 1972 tax returns (GX 83 at E. 373 and GX 84 for identification),

which the Court had not yet considered. After lunch, Judge Owen said that he had read the memoranda and suggested that he had not been persuaded and that the matter should "not be mentioned in the opening" (A. 17-18). At this point, the Government previewed the two sentences dealing with the matter which had been planned for inclusion in the opening, orally argued the theories in the memoranda, called to the Court's attention the CMB business record naming the Swiss bank "which your Honor didn't have this morning" (A. 19) and further represented that the Government intended to present "additional evidence [beyond the documents] that the defendant was aware that this was the source" (A. 19), *i.e.*, Mrs. Eva Brooke. It was in solicitation of, and prior to, this Government representation that the District Court made the statement quoted in Leonard's brief (App. Br. 41-42) concerning the need for reliance on counsel's "judgment" to describe only admissible evidence in opening rather than "having in effect an advance run of it" (A. 19).

In response, Leonard's counsel asserted during his opening, that the indictment did not contain "a charge of any false affidavit, because if the Government could prove that, there would be a longer indictment, and the third count of that longer indictment would say that he filed a false affidavit" (A. 49); and, further asserted that it did not contain "anything about a Swiss bank account. It's no crime to cash checks" (A. 48). Leonard's counsel also suggested that each of the UCC-Treadwell payments "was a wash transaction, which went in one hand and out the other" (A. 42) or, that they had been so treated by the CPA who prepared both returns, "one or both of" which had also been "shown to his lawyers" (A. 50). Finally, throughout his opening, Leonard's counsel interspersed ten separate denials that Leonard had acted "willfully" (A. 32 ll. 19-25; A. 33 ll. 2-3; A. 33 ll. 18-20; A. 35 ll. 5-8; A. 35 ll. 13-16; A. 41 ll. 14-15; A. 47 ll. 22-24; A. 51 ll. 12-13; A. 55 ll. 13-19; A. 62 ll. 20-24).

C. The District Court's Ruling.

At the offer of the August 27, 1969 affidavit (GX 74), the District Court overruled Leonard's lack of authenticity objection on the authority of 28 U.S.C. § 1731 and several admittedly genuine samples of Leonard's signature (A. 212-217). At the offer of the CMB checks (GX 81) and the testimony outlining the Banque Cantonale de Zurich's connection to them, and in answer to Leonard's argument that admissibility required proof "beyond a reasonable doubt that [the affidavit is] false" (A. 491), the District Court held that the affidavit's second exception—drafted not by Laski, as repeatedly stated by Leonard without citation anywhere to Laski's testimony on the subject (App. Br. 15-17, 44, and 46; A. 348), but by Leonard or one of his representatives—constituted a statement:

> ". . . that he had not had any transactions or dealings with any foreign banks—and it is perfectly clear that the year 1968 was in his mind because it's in the affidavit—that that statement was designed to, or the jury could find it was designed to, throw the IRS off the track" (A. 497).

Judge Owen then squarely rejected the argument, which Leonard repeats here, that there was insufficient proof of falsity and Leonard's knowledge of the same:

> "The Court: My feeling is that this in some degree a discretionary matter, and if a fellow got a check from the Chase Bank for $50, if in fact it came from Europe, I don't think that would entitle the same inference to be drawn that $383,000 entitles you to draw, and therefore, as a discretionary matter, if it were $50, I would rule it out.
>
> Mr. Tigue: But there comes a point when it is so large that the prejudice tips the scale compared to the probative value. That's what I wanted to bring out.

The Court: On the other hand, I see it as becoming so large that you virtually feel that he either knew or must have known the source.

In any event, there is in fact a direct conflict, because whether or not he knew, his statement is, "I did not have any dealings", and the fact is he had a dealing.

Mr. Tigue: With an American bank.

The Court: No. He had a dealing in fact with a Swiss bank. He got $383,000 from the Swiss bank.

Mr. Tigue: No, your Honor. It was from an American bank.

The Court: It came from a Swiss bank to an American bank. The size of the transaction, I think, to the contrary, is of a kind that carries almost its own knowledge of its source.

But in any event, there is a square conflict, as I see it, and to the extent inferences can be drawn, I am going to admit these checks." (A. 499-500).

Court and counsel then agreed upon an instruction, as to which no complaint is here made, limiting the jury's consideration of the proof only as to "the issue of Mr. Leonard s willfulness as charged in the indictment, should you reach that issue" (A. 503-504).

Further proof of the falsity of Leonard's 1969 affidavit was thereafter admitted, over only an ordinary, non-*Deaton* relevancy objection (A. 51), in the form of Leonard's summer 1971 admission to Mrs. Eva Brooke that he then had a numbered Swiss bank account (A. 511-512). Prior to Mrs. Brooke's cross-examination, counsel sought perhaps to expand that objection when he referred back to some unspecified "position with respect to all of this" (A. 514), but the District Court, nevertheless, admitted her testimony because it is:

". . . admissible as a statement in 1971 which this jury can take together with other evidence in the

> case and find that there was a Swiss bank account in existence at the time of the 1968 affidavit.
>
> Taken together with the 1968 Chase Manhattan checks which were monies that had come from Banque Cantonale de Zurich" (A. 514-515).

Finally, the Court admitted Leonard's statement, in his 1971 tax return, that he lacked "any interest in or signature or other authority" (GX 83 at E. 373) over any Swiss bank account at the time of his contrary representations to Mrs. Brooke (A. 519-520). The Court repeated the limiting instruction that such was admitted on willfulness "only if and when you reach that element in your deliberations" (A. 527).

D. The Government's Summation.

Contrary to Leonard's current argument * that he had no obligation to disclose "any indirect transactions" since "he was never asked about such transactions" (App. Br. 45, n.), the facts proved were just to the contrary. The Government's summation directed the jury's attention to (1) Leonard's second exception about a claimed 1968 Australian bank loan in connection with Leonard's business there, (2) his failure to show such interest payments in either his personal return or corporate books for 1968, and (3) the rebuttal proof that the Australia and New Zealand Bank could not have made such a $383,000 loan through international transfers to CMB via Banque Cantonale de Zurich (A. 773-802)—as had been suggested by defendant's counsel in both cross-examination and summation (A. 406, 504-507 and 900-901)—because of the lack of the U.S. dollar account necessary to such a transfer. The Government then urged that the jury "find that that was an after-

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* Leonard's argument here conveniently edits out of the quotation from the Government's summation that a "[*third*] *caveat*" (App. Br. 45 n.; emphasis in original) should have been inserted into the August 27, 1969 affidavit.

thought to explain" (A. 938) the patent inconsistency between the affidavit and such international transfers. Thereafter, the Government made the argument about "direct" and "indirect" foreign bank transactions which has been misleadingly edited and misquoted in Leonard's brief (App. Br. 45 including footnote).

E. The Court's Charge.

In its main charge, the District Court gave a third limiting instruction:

> "Now, this evidence and evidence of this kind was not admitted, and I told you this twice at the time, as proof of the falsification of either return here at issue but was admitted solely and exclusively for the purpose of showing conduct on the part of the defendant, should you credit it, bearing only on his willfulness or his intent to violate the statute for the years in question in the indictment.
>
> This evidence of prior, contemporaneous and subsequent conduct, if credited and believed by you, is not conclusive as to the defendant's intent in the years charged in the indictment but is merely a circumstance or some evidence to be considered along with other evidence in this case in determining whether or not there was the requisite willfulness on the part of the defendant to violate the law as charged respecting either his return for 1967 or for 1968." (A. 980-981).

F. The District Court's rulings were plainly proper and none constitutes any abuse of discretion.

Aside from the generalized citation to *United States* v. *Deaton*, 381 F.2d 114 (2d Cir. 1971) and *United States* v. *Crisona*, 415 F.2d 107 (2d Cir. 1971), Leonard has to date submitted no authorities to either the District Court or this

Court in support of the exclusion of similar act proof in criminal tax cases where willfulness is usually, as admittedly it was here, the "only issue" (A. 312). Moreover, he fails here, as below, to distinguish any of the six such cases supplied in the Government's memoranda to the District Court which held that such similar act proof was admissible in criminal tax cases on the issue of willfulness. *United States* v. *Egenberg*, 441 F.2d 441 (2d Cir. 1971); *United States* v. *Coblentz*, 453 F.2d 503 (2d Cir. 1972); *United States* v. *Williams*, 470 F.2d 915 (2d Cir. 1972); *United States* v. *Jernigan*, 411 F.2d 471 (5th Cir. 1969); *United States* v. *Taylor*, 305 F.2d 189 (4th Cir. 1962); *Harris* v. *United States*, 243 F.2d 74 (5th Cir. 1957). Nor can he properly or does he assert that this Court's equally persuasive decision in *United States* v. *Kaufman*, 453 F.2d 306 (2d Cir. 1971), holding that a false tax return was properly admitted as pertinent to the issue of willfulness in a false affidavit prosecution, and also cited below, was not properly relied upon.

Similarly, to date, Leonard has utterly failed even to inform this Court of the District Court's stated, independent ground of admissibility—that both the 1969 affidavit and the 1971 return are false exculpatory statements—and of the authorities supporting that ground, which were cited and relied upon below (*United States* v. *Simone*, 205 F.2d 480 (2d Cir. 1953); *United States* v. *Lacey*, 459 F.2d 86 (2d Cir. 1972); *United States* v. *Smolin*, 182 F.2d 782 (2d Cir. 1950)).

Instead, Leonard erects two strawmen which are wholly irrelevant, since this is neither a prosecution for a perjurious answer compelled during bankruptcy proceedings (*Bronston* v. *United States*, 409 U.S. 352 (1973)), nor the "plain, clear and convincing" case for admissibility posited by *dictum* in *United States* v. *Lawrance*, 480 F.2d 688, 691-692, n. (5th Cir. 1973) and *Kraft* v. *United States*, 238

F.2d 794, 802 (8th Cir. 1956). Here the District Court was convinced that there was "a square conflict" between the representations in Leonard's 1969 affidavit and the other evidence of their falsity, even without considering the backlighting effect on that issue of Mrs. Brooke's testimony (A. 500). In examining the individual exhibits in isolation, and separately arguing the inferences from each, Leonard simply forgets this Court's repeated admonition that:

> "[t]he trier is entitled, in fact, bound to consider the evidence as a whole, and, in law as in life, the effect of this generally is much greater than the sum of the parts. United States v. Bottone, 365 F.2d 389, 392 (2d Cir.), cert. denied, 385 U.S. 974, 875 Ct. 514, 17 L.Ed. 437 (1966) . . . . Moreover, 'each of the three episodes gained color from each of the others.' United States v. Monica, 295 F.2d 400, 401 (2d Cir. 1961), cert. denied, 368 U.S. 953, 82 S. Ct. 395, 7 L.Ed. 2d 386 (1962)." (*United States* v. *Wisniewski*, 478 F.2d 274, 279 (2d Cir. 1972)).

Finally, given the foregoing, the District Court, in rejecting Leonard's argument that the probative value of the similar act proof was outweighed by any asserted "highly inflammatory and prejudicial" character, was plainly correct. The District Court fully protected Leonard's rights by giving to the jury a careful limiting instruction on how that evidence was to be used, if at all. Even if others might disagree, there simply was no departure from "the wide range of discretion" accorded to the trial court in such matters. *United States* v. *Deaton*, 381 F.2d 114, 118 n.3 (2d Cir. 1967).

POINT IV

It was proper for the Government to advise its own employees during the course of pretrial interviews with defense counsel which of the latter's questions were proper to answer and which ones delved into impermissible areas. The District Court committed no error in refusing Leonard an additional, fourth continuance of his trial. The Government's opening was proper in all respects. As to all three matters, Leonard suffered no prejudice.

A. The "Internal revenue officer and employee" interviews.

Leonard argues that he was denied a fair trial because of both the prosecutor's presence at pre-trial interviews by defense counsel of Government agents and employees and because of the prosecutor's having objected at those interviews to "questions which were clearly relevant to matters covered in Leonard's indictment" (App. Br. 48). The argument is unsound. The District Court was clearly correct in refusing to order, as Leonard requested, either the prosecutor's total exclusion from the interviews of Government agents or to otherwise direct that the prosecutor not instruct and advise those witnesses "what questions to answer and not to answer" (A. 302a).

Prior to trial, Leonard's counsel wrote to seven IRS employees requesting an interview to discuss the facts of the case (A. 300a). The letter did not specify that objection would be made to solicitation by the agents of guidance and advice from the Assistant United States Attorney assigned to the case (e.g. A. 75a). Accordingly, as suggested, if not required, by 26 C.F.R. § 301.9000-1, each such "Internal revenue officer and employee" receiving

the "request" or "demand" for "internal revenue records or information" referred it to W. Cullen MacDonald, the Assistant United States Attorney assigned to Leonard's case, together with an indicated desire for the assistance of his "counsel in dealing with defense counsel in this interview" (A. 479a, A. 29a-33a and 75a-77a). Thereafter, defense counsel was advised of the witnesses' willingness to be interviewed on condition that the Assistant be present to advise when an objectionable question had been asked, because beyond those permitted by law and regulation to be answered (A. 301a), that a daily copy transcript be made because the witnesses desired not "to have counsel's recollection where a record could be made instead" (A. 479a), and that each witness be allowed "whatever changes [he] deems appropriate before it will be considered his prior statement" (A. 477a). While defense counsel agreed to the latter conditions, he did object at the outset of the interviews on January 2, 1975 "to the presence of Mr. MacDonald" and "to his directing the witness to answer" or not as appropriate (A. 478 and 300a-301a). Thereafter, all questions pertaining to the oral statements Leonard or his taxpayer-representative (including his accountants and attorneys) had made to the respective agent were allowed to be answered, if in proper form.* By permitting those questions to be answered, the Government waived its previously upheld** objection to the "oral" portion of Leonard's

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* While arguing that he was "denied the opportunity to question" Laski "as to his contacts with the prosecutor" by quoting one of the prosecutor's objections as to form (App. Br. 48), Leonard fails to quote the immediately preceding factual answer, which defense counsel was argumentatively rephrasing for his own purposes, where Laski described "three or four calls, when he [the prosecutor] told me to come in once and once he told me not to come in when it was postponed and then the new date" (A. 117a).

** On submission, Judge Owen had originally granted the "oral" portion (A. 21a), but on reargument on September 13, 1974, he modified his order and deleted it (A. 290a-291a).

Rule 16(a) motion which sought to discover "all written, oral or recorded confessions, admissions, or statements" (A. 16a), including even the agent's entire interview report and not just any portion "which purport 'to produce the exact words used by' him [Leonard] (*United States* v. *Armantrout*, 278 F. Supp. 517, 518 (S.D.N.Y. 1968))" (A. 27a). The Assistant also permitted the Government agents and employees to answer questions regarding the audit work they performed on Leonard's returns. However, the Assistant instructed the witnesses not to answer those questions which called for information regarding "inter-agent communications or internal workings" within the IRS (A. 441a). As the District Court later observed, upon its reading of the only transcript (A. 476-593) submitted to it by Leonard, the objections were generally limited to "talks between the agents themselves, 'what did you say to each other about the Leonard case?' " (A. 353a).

Leonard then orally moved the District Court (A. 302a) to exclude "Mr. MacDonald . . . [because] he has got a clear conflict of interest" (A. 352a), or, alternatively, to direct him "not to tell the witnesses . . . what questions to answer and not to answer" (A. 302a). He presented the Court with *Gregory* v. *United States*, 369 F.2d 185 (D.C. Cir. 1960) as the sole authority for his motion, despite the fact that there the Court was dealing with a lay witness and a deficient witness list, under 18 U.S.C. § 3432, and, in that statutory context, what has been recognized as, "The special status of pre-trial, discovery in capital cases. . . ." *United States* v. *Fink*, 502 F.2d 1, 7 (5th Cir. 1974). Furthermore, the attention of the Court was never directed to any specific question or subject, and no effort was ever made to narrow Leonard's original request for a broad injunction (A. 300-305a and 350a-359a).

Under these circumstances, the District Court denied the motions because "there are legal considerations that these men want and need counsel on as to what is appro-

priate" (A. 352a), and their selection of Government counsel should not be disturbed (A. 350a-352a). The Government represented that it would, and it thereafter did, obtain an affidavit from each witness concerning his selection of counsel (A. 29a-33a and 75a-77a).

At the outset, it seems clear that Government agents and employees who have participated in the investigation and preparation of a criminal case against a given defendant are not required to submit themselves to pretrial interview and examination by that defendant's attorney. A defendant's pretrial rights to discovery are governed by Rule 16 of the Federal Rules of Criminal Procedure, and the latter, of course, gives to a defendant no right to compel any such pretrial interviews of Government agents. Indeed, were the contrary to obtain it would enable a defendant to get by oral interview before trial what Section 3500 of Title 18, United States Code, now provides he may obtain only after the direct testimony of a given witness. As Judge Owen said, "that if the agent said, 'I don't want to talk to you under any circumstances,' then that is the end of it" (A. 353a). Moreover, Government agents and employees, unlike lay witnesses, are possessed not only of first hand information, but of information collected during the course of their investigation from others. Additionally, such agents, unlike lay witnesses, frequently continue to investigate and prepare a criminal case until the very eve of the trial of that case. To say that such agents must submit to pretrial questioning by a defendant's attorney would impair substantial Government interests and derogate from the established mode of pretrial discovery. Accordingly, where, as here, seven Government agents have submitted to such questioning and provided substantial additional information not otherwise producible before trial under the Federal Rules of Criminal Procedure, a defendant has obtained more than that to which he is otherwise entitled. Indeed, here *a fortiori*, of the seven agents or employees interviewed, only one was called thereafter as a

Government witness at trial. Where Government agents have voluntarily submitted to such interviews, the conduct, scope and nature of those interviews is surely a matter best left to the sound discretion of the District Court. It can hardly be said here that the District Court abused that discretion.

Moreover, each of the witnesses here was an employee of the IRS and, as such, an "officer or employee of the United States" within the meaning of both 18 U.S.C. § 1905 and 26 U.S.C. 7213(a). That latter section provides criminal penalties for any disclosures of specified internal IRS information "in any manner whatever not provided by law" (*Ibid.*). In addition, if the person making such an unauthorized disclosure is still an employee or officer at the time of conviction "he shall be dismissed from office or discharged from employment." In addition, 18 U.S.C. § 1905 more broadly prohibited each of these witnesses from disclosing "in any manner or to any extent not authorized by law any information coming to him in the course of his employment . . . by reason of any examination or investigation . . . which information concerns or relates to . . . any income . . . of any person." Thus, in response to every question, the witness was compelled to decide whether or not his answer could permissibly be disclosed both as "provided by law" (26 U.S.C. § 7213) and as "authorized by law" (18 U.S.C. § 1902) by reason of the authority of *Fed. R. Crim. P. 16.** Compare *Exchange Nat'l Bank of Chicago* v. *Abramson*, 295 F. Supp. 87 (D.C. Minn. 1969), which held that production of any information required to be produced by and under Rules 26-37, of the Federal Rules of Civil Procedure, cannot constitute a vio-

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* Indeed, in the instant case, it appears that in consenting to be interviewed before trial by defense counsel without first securing the authorization of certain other IRS officials, the seven agents inadvertently transgressed IRS regulations governing the production of information and documents in their possession. See 26 C.F.R. § 301.9000-1.

lation of 18 U.C. § 1905. It was because of precisely such "legal considerations" (A. 352a) as these that Judge Owen properly refused to interfere with the witnesses' choice of counsel.

In addition, Leonard's claim of substantive prejudice arising out of Laski's interview is wholly devoid of merit and moreover, is positively misleading. Contrary to the bald assertion (without any supporting record reference) that on January 6, 1975, at Laski's interview the "defendant was not aware that this was an FBA project case" (App. Br. 52), the record demonstrates that he became aware of precisely that fact:

> "Q. What project was that?" A. The foreign bank account project" (A. 93a).

Equally misleading is the succeeding suggestion (again without a record reference) that some unspecified instructions "blocked, at the very least, discovery of the relevant Post Office regulations" (App. Br. 42). In fact, nothing whatsoever was asked of Laski—even assuming he knew anything about Post Office regulations—on that score. Additionally, the impression that somehow counsel was frustrated as he "sought to question him [Laski] about the Swiss bank account affidavit" (App. Br. 42) is also belied by the record (A. 102a; see also 103a-104a). And, in any event, two days later in open court at the hearing on the motion to suppress, counsel was offered, and explicitly declined, the opportunity to ask Laski "any further questions" (A. 419a).

Finally, the best demonstration that no prejudice whatsoever resulted from the interview in Laski's cross-examination at trial on each of the foregoing matters (Compare A. 282-288, 337-340, and 346-348). The unsurprising truth simply is that the pretrial interview aided rather than obstructed defense counsel's efforts at cross-examination.

B. The requests for and the offers of a continuance.

As originally filed on July 11, 1974, Leonard's otherwise overly broad discovery motions did not seek similar act evidence (A. 16a-20a). The District Court's August 30, 1974 disposition denied the extreme request for the "names and addresses and statements of any and all witnesses" (A. 17a and 21a). Prior to November 4, 1974, Leonard sought and obtained his first continuance of that trial date to December 5, 1974 (A. 291a). On November 22, 1974, Leonard sought and obtained his second continuance to January 6, 1975, in order to substitute trial counsel (A. 1a, 300a and 326a). On January 2, 1975, the Government served its requests to charge, which included a proposed similar act charge (App. Br. 52-53). That occurred prior to an evidentiary hearing on the enforcement of a subpoena duces tecum to Leonard's corporation, at the end of which the Court advised counsel that two other trials would delay Leonard's trial by a day or two (A. 298a-299a). Leonard made no motion for further discovery on that day or the following until, on January 7, 1975 (A. 310a), his counsel orally sought discovery of the proof of similar acts (A. 312a). The Court, while taking that motion and several others under advisement, nevertheless granted Leonard a third continuance until Monday, January 13, 1975 (A. 348a). On January 8, 1975, following the FBA mail watch hearing, the District Court formally denied (A. 443a) the motion for discovery of similar acts but did "suggest" that the Government review its position (A. 444a-445a). The Government then provided further discovery of the CMB checks (GX 81 at E. 360-368 and 370-371) bearing six examples of Mr. Harris Egan's legible signature as well as Leonard's own 1971 and 1972 tax returns (GX 83 at E. 373-383 and GX 84 for identification). Instead of moving that Friday afternoon, January 10, 1975, counsel waited until Monday, January 13, 1975, after voir dire requests and other matters involving

the openings were finished (A. 2-7), and with the jury panel waiting in the courtroom, to move for a continuance on the basis of these exhibits "because it may require a trip to Switzerland to see where these checks came from" (A. 7-18). The District Court denied the motion for the reason that Leonard had doubtlessly "reviewed all of his [1968] financial transactions" with counsel (A. 11). On Tuesday morning, January 14, 1975, the Government further advised counsel as to the details of Harris Egan's testimony (A. 71-72). So armed, counsel claimed no difficulty or need for a continuance to prepare to cross-examine Egan, and he proceeded to do so on Thursday morning, January 16, 1975 (A. 479-507). Counsel did, however, ask for a continuance commencing at the end of the Government's case, without specifying any particular length or purpose (A. 503). After lunch, Mrs. Eva Brooke testified (A. 509-512), and then the Court recessed the trial until the following morning pursuant to Leonard's counsel's request to prepare for cross-examination (A. 516-517). Contrary to the current claim that the Government further "ambushed" the defendant by concealing the fact that Eva Brooke would be called as a witness (App. Br. 55), the truth is that prior to her taking the stand Leonard's counsel had already served a subpoena duces tecum upon the draftsman of her affidavit, which was marked as GX 3512-A-2 and later admitted as DX AE. He had done so, admittedly "in anticipation of this witness" (A. 515). In addition, the District Court advised Mrs. Brooke, in accordance with defense counsel's requested language (A. 518), of counsel's obvious desire to speak with her that evening, and she thereupon agreed. (A. 523a). During this private interview, counsel obtained an earlier, handwritten version of the aforementioned affidavit (A. 53; DX AF), but not an intermediate typed draft (DX AG) which had not been asked for in the interview, but which was nevertheless produced by Mrs. Brooke prior to the beginning of her cross-examination (A. 537). So armed with these prior statements, counsel thoroughly and ably conducted her cross-examination (A. 528-571), following which the Gov-

ernment rested (A. 573). At that point, even though the District Court had explicitly invited an explication of any "need for a continuance" (A. 508), none was made, nor indeed was any motion for such a continuance among the several defense motions at the close of the Government's case (A. 573-603).

Instead, Leonard proceeded with his own witnesses until the early afternoon adjournment for the weekend (A. 648). The following Monday, January 20, 1975, the first item of business involved witnesses' satisfactory compliance with two additional subpoenas duces tecum previously served in Oklahoma on Mrs. Brooke's bank and the Kerr-McGee Corporation (A. 650-654 and 680). Then the District Court, once again, inquired of Leonard's counsel about the specifics of his previous request for a continuance (A. 655). In response, he requested two weeks because "it may require a trip either to Switzerland or to Australia or both" to prove that the $383,000 was really the 1968 Australian loan described in Leonard's 1969 affidavit, which had been taken, through the use of correspondent banks, from there to Switzerland to CMB (A. 655-656). The Government opposed the request on the grounds that (1) records of the borrower, either Leonard Process Co. Inc. or Leonard himself, were not shown to be unavailable locally and (2), in any event, the Government would be proving the impossibility of such a loan transfer by calling the New York representatives of the Australian bank (A. 657-658). The Court reserved decision (A. 658) and the defendant completed the testimony of its witness and rested "subject to the application," which was then denied (A. 664-665).

The Government's rebuttal consumed the balance of the day and included the promised testimony of Roderick D. McLeod, the North America representative of the Australia and New Zealand Bank Group, as to the impossibility of a $383,000 transfer to Banque Cantonale de Zurich from

his bank (A. 773-802). The following day, January 21, 1975, nineteen days after first reading that the Government intended to offer similar act proof, eleven and seven days, respectively, after receiving the CMB checks and the oral outline of Egan's testimony thereon and at least six days after having anticipated Mrs. Eva Brooke's testimony by serving process on numerous individuals connected with her, the Government and Leonard both rested (A. 843).

As Mr. Justice Clark, sitting by designation, recently said under somewhat similar circumstances:

> "*United States* v. *Baum*, 482 F.2d 1325 (2d Cir. 1973) . . . is therefore distinguishable since appellant had both notice and opportunity to meet the Government's proof of concurrent criminal conduct." (*United States* v. *Braasch*, 505 F.2d 139, 149 (7th Cir. 1974).

C. The Government's opening was proper and fair in all respects.

Leonard argues that he was deprived of a fair trial because the Government's opening intentionally included assertions of "other crimes" which, because both "untrue and never proven" (App. Br. 56), were "designed and had the effect" of unfairly and without a proper evidentiary basis "convincing the jury that Leonard was guilty of a continuous and gross pattern of tax evasion and purposeful concealment" (App. Br. 57). The argument is incorrect.

The four factual assertions complained of here are described as "commercial bribes" from Treadwell to Leonard, failure to "supply documentation" to the IRS, Leonard's employ of Swiss bank channels during years other than 1968 and, finally, his false statements to two IRS agents that litigation delayed UCC's issuance of checks until shortly before their being deposited in 1968.

The first three such "other crimes and misconduct" were extensively proven and fairly presented to the jury by both sides. Moreover the term "commercial bribery" was never used or suggested by the Government in its opening. The Government's single use in its opening of the shorthand phrase "an override or a kickback" (A. 29) referred only to the UCC-Leonard-Treadwell-Leonard payments, which the Government earlier in its opening had previously described at length and in detail including the underlying contract provisions (A. 22-23).

As to the second point, the jury was told that Laski would testify that he asked Leonard for documentation underlying the UCC payment delay and the contract interlineation and that Leonard never supplied any such documents (A. 25). That representation was made in good faith and premised on the fact that Laski had so stated one week earlier during his interview by Leonard's counsel (A. 95a). At the point during Laski's direct examination at trial at which he was to testify about the subject now in issue, he was interrupted by a groundless objection (A. 208), and after he was allowed to continue, he inadvertently omitted the expected testimony (A. 207-211). Defense counsel on cross-examination, skillfully refrained, of course, from refreshing Laski's recollection on that subject (App. Br. 57).

With regard to the third point, the jury, of course, knew that in 1971 Leonard bragged to Mrs. Brooke about then having a numbered Swiss account which, presumably, he then employed in some fashion, if only as a savings repository. Moreover, in this regard, the District Court fully protected Leonard's rights by instructing the jury, as Leonard requested, "that the mere transaction of a person with a Swiss or other foreign bank or . . . to have a foreign or Swiss bank account . . . is not illegal" (A. 504).

Finally, as to the fourth allegation, the Government's opening faithfully restated the statements made by Levy and Tragna to Leonard's counsel during the pretrial interviews to the effect that Leonard had told them that "litigation" accounted for UCC's not delivering the 1967 checks for $37,000 until 1968 (A. 201a and 514a; see also GX 3502, June 16, 1971, Memorandum of Conference, p. 4). Moreover, it was fully permitted, in good faith, to elicit from the UCC personnel an accurate and complete history of the administration of the UCC agreement, including when litigation first threatened and then abated (A. 93 and 156), in anticipation that Leonard might testify and repeat what he had originally said to Levy and Tragna on this subject. When, because of developments at trial, the Government altered its original intention and determined not to call Levy or Tragna, and when Leonard declined to testify, the jury learned only the UCC half of the story and, as a consequence, Leonard's counsel skillfully exploited in summation the Government's failure to keep its opening commitment to prove "some conversation which was supposed to have taken place in 1971 with some agent" (A. 849).

Furthermore, the District Court properly instructed the jury that openings were not evidence (A. 961). Leonard sought no more at trial and is entitled to nothing further here. The District Court's exercise of its discretion in refusing to grant a new trial on this ground was in all respects proper. (*Mares* v. *United States*, 409 F.2d 1083, 1085 (10th Cir. 1968), *cert. denied*, 394 U.S. 963 (1969)).

POINT V

The District Court properly admitted Leonard's 1967 return and its underlying workpapers, all of which consistently record the UCC component at $291,000. Leonard's own handwritten identification of the five "UCC" deposits making up that sum firmly establishes his failure also to include the cash he had pocketed.

Leonard argues that with respect to the 1967 tax return there "was no testimony as to what income was actually included in that return and the documents are silent on that question" (App. Br. 60). The argument is frivolous.

Leonard's own handwritten "UCC" notations on his 1967 FNCB monthly statements identify each bank deposit of UCC income, for a total of $291,000 (GX 76 at E. 286, 288, 289 and 292). Bardes testified that she used GX 76 to prepare her income and expense schedule C which repeats the $291,000 as UCC income (A. 426; GX 77 at E. 296-297). The same figure is included in both of her other draft schedules, excerpts from which Leonard footnotes without the additional entries which, albeit silently, reconcile all differences suggested by Leonard between the quoted totals of $461,000 and $553,423.13 (App. Br. 60 n; GX 92 at E. 408-409). Further it is of no moment that she did not identify the author of the handwritten final $461,000 of gross receipts on the signed return (GX 1 at E. 10). The remaining income components of the $461,000 in gross receipts are similarly identified in Leonard's own handwriting throughout the FNCB monthly statements for 1967 (GX 76 at E. 283-295), and into the aforementioned Bardes' drafts. None includes the $24,168.00 which Leonard pocketed.

The District Court properly held that the Bardes evidence sufficed to establish the connection between the 1967 return (GX 1) Leonard signed and the FNCB bank statements (GX 76) on which Leonard had indicated some of his income items, but not the cashed Treadwell checks (A. 584). In addition, Leonard's oral statement to Laski that he had not received any of the 10% payments under the altered paragraph 3(e) of the UCC contract is independent proof that his 1967 return under audit did not include those sums in some other account.

POINT VI

The District Court correctly excluded several different draft tax returns for the Leonard Process Company, Inc., offered through an inappropriate witness, which included different corporate financial statements intended to prove that the corporation had lost money. Leonard refrained from reoffering any of those returns during his own case. Given this state of the record, the District Court was plainly correct in declining Leonard's overly broad request to charge.

Leonard argues that the District Court erred in excluding DX X, offered by Leonard as proof that Leonard Process Company, Inc. lost $73,742.33 (the taxable income reported as the bottom line on this version of its unfiled 1120 S tax return), during the testimony of Emil Nothofer, who knew nothing about the return except that it had been prepared by someone else in his accounting firm (A. 466-473). Leonard further argues, in the face of the fact that he elected at trial to offer no further authenticating proof for that exhibit and despite the existence of another 1120 S return (GX 92) with a $29,017.77 bottom line loss, that the District Court nonetheless erred in declining to charge the

jury that "as a matter of law", Leonard Process Company, Inc. lost approximately $73,000, and that the Treadwell checks cashed after February 1, 1968 were "returns of capital and not taxable" (A. 66a). Both arguments are incorrect and should be rejected.

As to admissibility, Nothofer was not the author of DX X and his testimony, as the District Court noted, failed to connect DX X to "the books of the company" (A. 471). Therefore, it was simply an unfiled federal tax return for Leonard Process Company, Inc. prepared by Nothofer's firm, and when admitted as proof of that latter and limited fact, was not evidence of the truth "of any of the financial matters contained in it". And the jury was properly so instructed (A. 473). Leonard elected not to offer any other profit and loss statement for his corporation; and further elected not to call the author of DX X doubtlessly because the Government had introduced on the same basis the other unfiled 1120 S return (GX 94) which showed a loss for the same period of some $43,000 less than that stated in DX X. Accordingly, in the absence of the testimony of the author to authenticate the returns, they are not admissible for the truth of their contents. (*Standard Oil Company of California* v. *Moore*, 251 F.2d 188, 222-223 (9th Cir. 1957), *cert. denied*, 356 U.S. 975 (1968)).

Leonard's requested charge was properly refused for several reasons independent of its extreme and undue breadth. In the first place, there was no showing that Leonard Process Company, Inc. had secured the required "prior approval of the Commissioner" (26 C.F.R. § 1.442 1(b) to change its previously elected taxable year to something other than calendar 1968. Thus, the argument that the "amended" 1120 S return (DX X at E. 359) for a tax year ending on January 31, 1969, proved "a loss of approximately $73,000" (A. 66a) wholly fails. Whatever the profit or loss for calendar 1968, Leonard should have reported it with those of his and his wife's other two subchapter S

corporations on Part III of Schedule B (GX 2 at E. 41). Secondly, even assuming that UCC's March 22, 1968, limited "written consent"—given only because Leonard remained "obligated . . . notwithstanding said assignment" (GX 65 at E. 171)—had the effect of transferring his "right to receive the Treadwell payments" (App. Br. 64), he had still personally received and cashed $21,642.13 by that date, none of which is even arguably a return of capital. In the third place, even accepting that balance sheet, Leonard had only $100 of capital to be returned (DX X at E. 562). Even *Dizenzo* v. *C.I.R.*, 348 F.2d 122 (2d Cir. 1965) does not hold that diversions larger than paid-in capital should be nontaxable, for the good reason that once the basis in the stock is reduced to zero, the "excess shall be taxable in the same manner as a gain from the sale or exchange of property" (26 U.S.C. § 301(c)(3); *Id.* at 125). In any event, *Davis* v. *United States*, 226 F.2d 331 (6th Cir. 1955), which appears to remain the controlling criminal decision in this area, holds that sums such as Leonard received and retained here from UCC were income to him and required to be declared as such. However, until a subchapter S taxpayer embezzles from his corporation with an identical tax year, the apparent conflict need not be resolved. Even if Leonard had properly proved corporate losses for a taxable period ending January 31, 1969, he still was not entitled to the charge which he requested, and the District Court properly so held.

POINT VII

The trial court properly refused to dismiss Counts One and Two.

Leonard contends that all three counts of the indictment should have been dismissed on the authority of *United States* v. *Basurto*, 497 F.2d 781 (9th Cir. 1974), because the grand jury had been "misinformed as to material fact" (App. Br. 66). Specifically, Leonard relies on the fact that Agent Laski received the altered UCC contract in 1969, rather than in 1970 as was testified to in the grand jury and as Count Three of the indictment accordingly charged. The contention is without merit. Promptly on receipt of this information, the Government informed Leonard's counsel of the fact and moved to dismiss Count Three.

Leonard's reliance on *Basurto* is unfounded. That case involved perjurious testimony before a grand jury which permeated the indictment. The relevant testimony before the grand jury in this case was only "erroneous," and not perjurious (App. Br. 66), thereby taking this issue far from the express dictates of *Basurto*. Judge Owen specifically so found (A. 445a), and the grand jury minutes are available to this Court for inspection.

The court in *Basurto* clearly indicated that the cases upon which it based its decision involved "violation or abuse of . . . prosecutorial duty . . ." (*Basurto, supra* at 786, and see cases cited therein.) There has been no suggestion that the Government in this instance has been guilty of any such involvement. Indeed, the Government promptly informed Leonard's counsel before trial of the "refreshed-unrefreshed recollection" error (A. 35a) and thereafter moved to dismiss Count Three of the indictment.

Furthermore, notwithstanding the error regarding the date on which Laski first received the UCC contract, that contract, with the override provisions lined out (GX 66), was properly considered by the grand jury as to Counts One and Two. Leonard suggests that the corrections to the contract are susceptible of innocent explanation on the basis of UCC's discontinuance of the South Charleston project (App. Br. 67). The deleted override provisions, however, applied to that project as well as to the Taft project, and it was override payments on account of the Taft project which Leonard knowingly failed to report. The grand jury, therefore, was properly permitted to consider Leonard's alteration of the contract as an attempt to conceal his entitlement to, and receipt of, Treadwell monies under the override agreement. For the grand jury's purpose in this regard, the actual date of such alterations, and the date of their disclosure to Revenue Agent Laski, were irrelevant. Therefore the later discovery that the date of receipt of the document was in fact 1969 and not 1970, in no way impairs the indictment on Counts One and Two.* Accordingly, the trial court did not err in refusing to dismiss Counts One and Two of the indictment.

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* Leonard suggests that, "[o]bviously," he would not have fraudulently made such an alteration in 1969, when his 1968 tax return had not been filed and he was aware of the investigation of his 1967 return (App. Br. 67). Whether or not such a suggestion is so "obvious," the grand jury, and later the trial jury, could properly have considered that such concealment had been attempted.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

W. CULLEN MACDONALD,
JOHN C. SABETTA,
Assistant United States Attorneys, Of Counsel.

ADDENDUM

FBI #21

REFERRAL REPORT FOR POTENTIAL FRAUD CASES

TO	Chief, Audit Div.	DATE 8/19/70	NAME AND ADDRESS OF TAXPAYER	SS OR E.I. NO.	TYPES OF TAX INVOLVED
TO	Chief, Intell. Div.	DATE 8/19/70	Leonard, Jackson & Sondra Susan		
TO	Chief, Audit	DATE 8/25/71	870 U.N. Plaza Apt. 31D	133-07-7617	Income
TO	Group Supervisor	DATE 9/16/71	New York, N.Y. 10017		

This case has been reviewed by the Intelligence Division, and action indicated taken. →

- ☐ Rejected Before Preliminary Investigation (Statement of reasons attached)
- ☑ Accepted for Preliminary Investigation
- ☐ Closed After Preliminary Investigation (Copy of closing report attached)
- ☑ Accepted for Full-scale Investigation Assigned to Special Agent (Name): B-6 M. Levy
- ☐ Please Assign Cooperating Officer

SIGNATURE, CHIEF INTELLIGENCE DIVISION: W. E. Walton, Jr.

1. REFERRAL REPORT CONCERNS -

- ☒ UNDERSTATEMENT OF TAXABLE INCOME
- ☐ FAILURE TO FILE RETURN FORM(S)_____
- ☐ OTHER (Specify) _____
- ☒ FAILURE TO COLLECT AND PAY OVER TAX
- ☐ FAILURE TO MAINTAIN ADEQUATE RECORDS

2. PERSONAL HISTORY

APPROX. AGE	APPARENT HEALTH	STATUS	EDUCATION (Highest level)	NO. OF EXEMPTIONS (Including taxpayer & spouse)
50	☒ GOOD ☐ POOR	☐ Single ☒ Married ☐ Head of household	College Graduate	3

SOURCES OF INCOME OF TAXPAYER AND SPOUSE (List principal occupations)

Individual Proprietor - Schedule "C" - Self Employed Engineer

3. RECORDS WERE KEPT BY - ☒ TAXPAYER ☐ EMPLOYEE ☐ BOOKKEEPING SERVICE ☐ OTHER (Specify)

☐ CASH RECEIPTS JOURNAL	☐ SALES JOURNAL	☐ SUBSIDIARY LEDGERS	☒ BANK STATEMENTS	☐ PURCHASE INVOICES
☐ CASH DISBURSEMENTS JOURNAL	☐ GENERAL JOURNAL	☐ RECORD OF INVENTORY	☐ DEPOSIT TICKETS	☐ SALES ORDERS
☐ PURCHASES JOURNAL	☐ GENERAL LEDGER	☒ CANCELLED CHECKS	☐ SALES INVOICES	☒ SINGLE ENTRY JOURNAL

☒ SINGLE ENTRY	☒ COMPLETE	☒ AGREE WITH RETURN	☒ CASH BASIS	INADEQUATE RECORDS NOTICE SENT ☐ FORM 7020 ☐ FORM 7021
☐ DOUBLE ENTRY	☐ INCOMPLETE	☐ DO NOT AGREE WITH RETURN	☐ ACCRUAL BASIS	DATE ISSUED
☐ OTHER BASIS (Specify)				

4. TENTATIVE ADDITIONAL TAXABLE INCOME DISCLOSED BY EXAMINATION TO DATE: (If excise - Additional taxable sales)

TAXABLE PERIOD	RETURN FORM	PER RETURN	CORRECTED	ADDITIONAL	METHOD USED IN DETERMINATION
1966	1040	$ 114495.	$ 407305.	$ 292810.	Cash receipts &
1967	1040	159108.	657515.	535407.	disbursements method

4a. Show portion of the tentative additional income which is due to purely technical adjustments (Give details)

1966 - $17486. Unsubstantiated expenses and/or payments deemed to be personal
1967 - 17078 not allowed

1 1970

5. Statement, if any, taxpayer has made regarding cash-on-hand, gifts, inheritances and non-taxable sources of income.

To explain payment of $28000. to structural & electrical design (Catalytic Construction of Canada Ltd.) for which taxpayer had no checks. Mr. Leonard claims to have paid same in cash.

FILES CHECKED
_____ Numbered Cases
_____ Unnumbered Cases
_____ TCR's
_____ Other

6. Receipts of taxpayer

☒ ALL DEPOSITED ☐ MOST DEPOSITED ☐ PART DEPOSITED ☐ NONE DEPOSITED Initials _____

* T/P deposits in many accounts but has submitted only one bank account.

7. Apparent reasons for understatement or other noncompliance including explanation, if any, offered by taxpayer.
Taxpayer advanced no reason

8. Name and address of person preparing return.
1966 - prepared by taxpayer
1967 - Lefkowitz, Brewer & Driver 290 Madison Avenue New York

Were his work papers examined?
☐ YES ☒ NO

9. Has settlement of case been discussed with either the taxpayer or his representative?
☐ YES ☒ NO ***(F.B.A. Project Case)**

Attach schedule showing specific items of omitted income →

10. Schedule No. Attached
Photostats of copies of checks & letters.

11. Has taxpayer or his representative been issued a district conference invitation and furnished with a statement of proposed adjustments or a RAR?
☐ YES ☒ NO

Attach schedule showing adjustments to prior year returns, if material →

12. Schedule No. Attached

13. Date, [illegible] and name of person with whom first audified return or returns were being examined by the Internal Revenue Service
June 14, 1968 K/A Rothstein - by telephone.

14. Information indicating intent to defraud on the part of the taxpayer, and any other information not covered above *(If necessary, attach separate sheet)*:

As per photostats attached (item #11) taxpayer has not indicated where funds were deposited. Taxpayer claims to have only one bank account. Endorsements on cancelled checks indicate more than one bank account present. Taxpayer has received payments from customers for chemical purchases billed to said parties. Taxpayer cannot prove purchase and/or payment to supplier of chemical.
During years 1966 & 1967 taxpayer has also diverted funds to a corporation account (Leonard Process Company Inc.), cashed checks, endorsed checks and made payments direct to third parties.

(Schedule Attached)

15. Did taxpayer engage legal counsel after examination began? ☐ YES ☐ NO ☐ NOT KNOWN

SIGNATURE, EXAMINING OFFICER	GROUP	DATE
[illegible]	2CV	8/14/69

ADDITIONAL COMMENTS OF GROUP SUPERVISOR OR CHIEF, AUDIT DIVISION

SIGNATURE, GROUP SUPERVISOR	DATE
[illegible]	Aug 19 1970
SIGNATURE, CHIEF AUDIT DIVISION	DATE
[illegible]	8/20/70

LEONARD, JACKSON & SONDRA SUSAN

W. P. No.	
ACCOUNTANT	
DATE	

		1966	
UNREPORTED INCOME:			
CHINOOK CHEMICALS CORP		188840.83	
JAPAN GAS CHEMICAL	(1)	130000.00	
UNION CARBIDE CORPORATION	(2)	1400000	$13840.83
PURCHASES BILLED:			
IMPERIAL CHEMICAL INDUSTRIES		2742600	
UNION CHIMIQUE BELGE		1095000	
C. ITOH & Co. AMERICA INC.		519750	
GENERAL ANALINE & FILM CORP.		881738	
UNION CHIMIQUE CHEMISCHE BEDRIJVEN		979525	6148244
TOTAL			$75[illegible]
		1967	
UNREPORTED INCOME			
NISSAN CHEMICAL INDUSTRIES LTD		1000000	
GENERAL ANALINE & FILM CORP.		174788	
UNION CARBIDE CORP		646549	7394517
DIVERTED TO THIRD PARTY			
UNION CARBIDE CORP (ENDORSEMENT TREADWELL CORP)			3333855
DEPOSITED IN CORPORATION ACCOUNT			
UNION CARBIDE CORP.			11100000
TOTAL			$18378 7[illegible]

(1) TAXPAYER REPORTED NET PROCEEDS AND ALSO DEDUCTED TAX WITHHELD AT SOURCE OF $13000.-

(2) TAXPAYER DEPOSITED $10000.- INTO SEPARATE BANK ACCOUNT AND CASHED CHECKS TOTALING $1000.-

02410

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

David W. Denton being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 23d day of June, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

James Schreiber
Walter, Conston, Schleimer & Krumpel
330 Madison Avenue
New York, New York 10017

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

David W. Denton

Sworn to before me this
23rd day of June, 1975

Mary L. Avent

MARY L. AVENT
Notary Public, State of New York
No. 6[illegible]
Qualified in Bronx County
Cert. filed in Bronx County
Commission Expires March 30, 1977